In witness whereof, the said corporation has caused this statement and certificate to be signed in its name by its President, and its corporate seal to be affixed hereto, this 24th day of January, 1913.

LONG SAULT DEVELOPMENT COMPANY.
ARTHUR V. DAVIS, *President.*

54 STATE OF PENNSYLVANIA,
County of Westmoreland, ss:

Arthur V. Davis, being duly sworn, deposes and says that he has read the foregoing certificate and statement of the Long Sault Development Company and that, in behalf of the said Company and as its president, he signed the same in its name and caused to be affixed thereto its corporate seal, and that the said statement and certificate is in every respect true.

ARTHUR V. DAVIS.

Sworn to before me this 24th day of January, 1913.

____ ____,
Notary Public.

(Here follow maps (Exhibits G and H), marked pages 55 and 56.)

57 EXHIBIT I.

State of New York.

No. 110. Int. 108.

In Senate.

January 13, 1913.

Introduced by Mr. Wagner, read twice and ordered printed, and when printed to be committed to the Committee on Finance.

An Act

To Repeal Chapter Three Hundred and Fifty-five of the Laws of Nineteen Hundred and Seven, Entitled "An Act to Incorporate the Long Sault Development Company, and to Authorize said Company to Construct and Maintain Dams, Canals, Power-houses and Locks at or near Long Sault Island, for the Purpose of Improving the Navigation of the Saint Lawrence River and Developing Power from the Waters Thereof, and to Construct and Maintain a Bridge, and Carry On the Manufacture of Commodities," Providing for the Repayment to such Company of Certain Moneys Paid by it under such Act and making an Appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter three hundred and fifty-five of the laws of nineteen hundred and seven, entitled "An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault Island, for the purpose of improving the navigation of the Saint Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and
58 carry on the manufacture of commodities," is hereby repealed upon the following grounds:

First. That chapter three hundred and fifty-five of the laws of nineteen hundred and seven is unconstitutional in that it contravenes section eighteen of article three of the state constitution, which provides that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Second. That the said act is unconstitutional in that it contravenes section seven of article seven of the state constitution which provides that the lands of the state now owned or hereafter acquired, constituting the forest reserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private.

Third. That the said act violates section sixteen of article three of the state constitution, which provides that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in its title.

Fourth. That the said act is invalid as being in excess of the powers of the legislature, in that it attempted to provide for the alienation of the state to the Long Sault Development Company of title to the land in the bed of the Saint Lawrence river. The title of the state in those lands is a sovereign right rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

§2. The state comptroller is hereby authorized and directed to cause the repayment and return to the Long Sault Development Company of any and all sums paid by such company into the state treasury, under the provisions of section four of chapter three hundred and fifty-five of the laws of nineteen hundred and seven,
with interest on said respective sums from the times of
59 their several payments, upon securing proper vouchers therefor; such moneys to be paid out by the state treasurer upon the warrant of the comptroller from the moneys hereinafter appropriated therefor. Such company is continued in existence for the purposes only of receiving and giving proper vouchers for said moneys, making proper distribution or application thereof among its members or other persons entitled thereto, and the winding up of its affairs.

§3. The sum of thirty-six thousand three hundred and twenty dollars ($36,320), or so much thereof as may be necessary, is hereby appropriated out of moneys in the state treasury not otherwise appropriated for the purpose of making the payments provided for in this act.

§4. The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal.

§5. This act shall take effect immediately.

60 *Affidavit of Charles H. Wolfe, Verified February* 8, 1913, *Read in Support of Motion.*

Supreme Court of New York, Albany County.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

STATE OF NEW YORK,
County of New York, ss:

Charles H. Wolfe, being first duly sworn, deposes and says that he resides in the Borough of Manhattan, City of New York, and is over the age of twenty-one years; that on the 21st day of January, 1913, at the request of the President of the Long Sault Development Company, deponent went to Albany and personally delivered to the

Honorable John J. Kennedy, Treasurer of the State of New York, at his office in the City of Albany, a letter dated January 21st, 1913, a copy of which, marked "Exhibit B," is annexed to the petition herein, of the Long Sault Development Company, verified the 8th day of February, 1913; deponent also delivered to and left with the said State Treasurer at the same time the enclosures referred to in said letter, namely, cashier's check on the National Bank of Commerce in the City of New York, payable to the order of said State Treasurer, for the sum of $25,000, voucher therefor, and verified statement of the Long Sault Development Company, in
61 respect of the development of electrical power, a copy of said statement, marked "Exhibit C" is attached to the said petition herein, of Long Sault Development Company. After examining the said letter and enclosures, the said Treasurer signed and handed to deponent a receipt of which the following is a copy:

"January 21/13.

Received from C. H. Wolfe check on National Bank of Commerce of New York for $25,000 ac. Long Sault Development Company.

JOHN J. KENNEDY,
State Treasurer."

Deponent was subsequently informed that the State Treasurer returned the aforesaid check and other enclosures contained in the letter which deponent had delivered as aforesaid, and refused to receive the same for reasons stated in a letter addressed by him to Arthur V. Davis, President of the Long Sault Development Company, under date of January 22nd, 1913.

Thereupon, and pursuant to instructions of said President of Long Sault Development Company, deponent again went to Albany and on the 27th day of January, 1913, had a personal interview with the said John J. Kennedy, Treasurer as aforesaid, at his office as State Treasurer in the City of Albany, and delivered to and left with him a letter, dated January 27th, 1913, a copy of which marked "Exhibit D" is attached to the aforesaid petition herein of Long Sault Development Company. Deponent also at said time delivered to and left with said Treasurer a verified statement as to development of electrical power herein previously referred to, a copy of which marked "Exhibit F-1" is attached to said petition, and deponent at the same time tendered to and delivered to said State Treasurer the sum of $25,000 in United States Legal Tender Notes in payment of the obligation of the Long Sault Development Company as stated in said letter dated January 27th, 1913. Said State Treasurer took the papers and money out of the room, re-
62 turned shortly and stated to deponent that he could not receive them under the advice of the Attorney-General, because the charter of the Long Sault Development Company was unconstitutional, and he thereupon returned the money and other papers to deponent and positively refused to accept, receive or retain the same. Deponent accordingly returned the said sum of $25,000 to the Long

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Sault Development Company. Deponent did not take back with him the said papers, but left them on the desk of the State Treasurer.

CHARLES H. WOLFE.

Sworn to before me this 8th day of February, 1913.
[SEAL.] JOHN J. GALLAGHER,
Notary Public (No. 153) New York County, Reg. No. 3170.

Affidavit of John C. Crasper, Verified February 7th, 1913, Read in Support of Motion.

Supreme Court of New York County.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

STATE OF NEW YORK,
County of New York, ss:

John C. Crasper, being duly sworn, deposes and says: that he has resided in St. Lawrence County for thirty years, and is
63 familiar with the character of the land and the location of the Forest Lands in that County, and familiar with the location of the forests in said County, and is entirely familiar with the lands situated along the banks of the St. Lawrence River in said County. That Barnhart's Island and Long Sault Island referred to in the act incorporating the Long Sault Development Company, being Chapter 355 of the Laws of 1907, are situated in Messena Township, and said islands are settled as farming communities and have been for upwards of fifty years, that on each of said islands are cheese factories for the manufacture of products of milk; several families on each island which are engaged in the business of producing milk to be manufactured into butter and cheese and shipped to New York; that there are no Forest Lands within twenty-five miles of the River St. Lawrence, St. Lawrence County, and the only woodlands within said distance are such pieces of timber as the farmers who settled the county for agricultural purposes upwards of fifty years ago, left to supply themselves with necessary firewood; that the lands on the main land adjacent to said islands are used for farming purposes; that the Villages of Messena and Messena Centre are located not far distant from the site of the proposed works, and all of the land between such site and the Forest Lands located within the county are settled farming community and have been for upwards of thirty years, and the conditions described in this affidavit have existed for the same length of time.

JOHN C. CRAPSER.

Sworn to before me this 7th day of February, 1913.
[SEAL.] JOHN J. GALLAGHER,
Notary Public (No. 153), New York County, Reg. No. 3170.

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64 *Affidavit of George W. Batten, Verified February 15th, 1913, Read in Opposition to the Motion.*

Supreme Court, Albany County.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

STATE OF NEW YORK,
County of Albany, ss:

George W. Batten, being duly sworn, says: I am the Deputy Treasurer of the State of New York. As such Deputy Treasurer I admit that on or about January 27, 1913, a legal tender of the sum of $25,000. was made to the State Treasurer on behalf of the Long Sault Development Company on account of the requirement in its charter that an annual payment be made and that the sum so tendered was the amount required by the statute to be paid for the year ending December 31, 1912. I also admit that the money so tendered was refused by the Treasurer because he was advised by the Attorney-General that the act incorporating the company is unconstitutional.

On information and belief I deny that the refusal of the State Treasurer to receive the sum above stated has caused to the petitioner any legal damage.

This affidavit is made by me because the State Treasurer is not in the County of Albany.

GEO. W. BATTEN.

Sworn to before me this 15th day of February, 1913.

ISAAC BLAUVELT,
Notary Public, Albany Co.

65 *Stipulation Waiving Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing printed papers are true and correct copies of the notice of appeal, the order appealed from, and the papers used before the court on the hearing of the motion and of the whole thereof, now on file in the office of the Clerk of the County of Albany; and certification thereof pursuant to Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, Albany, March 1st, 1913.

STRONG & CADWALADER,
Attorneys for Appellant.
THOMAS CARMODY.
Attorney-General, Attorney for Respondent.

Affidavit of No Opinion.

STATE OF NEW YORK,
County of New York, ss:

John F. Charlton, being duly sworn, deposes and says that he is an attorney at law and managing clerk in the office of Strong & Cadwalader, attorneys for the appellant herein, the Long Sault Development Company; that no opinion was rendered by the Hon. Justice Cochrane in deciding the application for a writ of mandamus herein.

JOHN F. CHARLTON.

Sworn to before me this 1st day of March, 1913.

RUSSELL S. WOLFE,
Notary Public, New York County,
No. 189, New York Registers No. 3146.

66 *Order of Appellate Division Affirming Order Denying Writ.*

At a Term of the Appellate Division of the Supreme Court Held in and for the Third Judicial Department, Held at the Court Rooms in the City of Albany, N. Y., Commencing on the 6" Day of May, 1913.

Present:

Honorable Walter Lloyd Smith, Justice Presiding.
Honorable John M. Kellogg,
Hon. George F. Lyon,
Honorable Wesley O. Howard,
Honorable John Woodward,
Associate Justices.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

On reading and filing the annexed consent of the attorneys for the parties hereto dated the 14th day of October, 1913, and upon reading the order therein referred to entered herein on the 29th day of September, 1913, and on motion of Strong & Cadwalader, attorneys for the appellant, it is

Ordered that the said order entered herein on the 29th day of September, 1913, be and the same hereby is resettled so as to read as follows:

67 At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, Held at the Court Rooms in the City of Albany, N. Y., Commencing on the 6th Day of May, 1913.

Present:

Honorable Walter Lloyd Smith, Justice Presiding.
Honorable John M. Kellogg,
Honorable George F. Lyon,
Honorable Wesley O. Howard,
Honorable John Woodward,
Associate Justices.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

The above named relator Long Sault Development Company, having appealed to this court from an order rendered by the Supreme Court and entered in the office of the Clerk of the County of Albany on the 20th day of February, 1913, which denied as a matter of right and not as a result of the exercise of the court's discretion, the application of the Long Sault Development Company for a writ of mandamus against John J. Kennedy as Treasurer of the State of New York, respondent, and said appeal coming on to be heard in this court and having been argued by Henry W. Taft of counsel for the appellant and by Thomas Carmody, Attorney-Gen-
68 eral, for the respondent, and due deliberation having been had thereon, it is

Ordered that the order so appealed from be and the same hereby is affirmed as a matter of law and not in the exercise of the court's discretion, without costs.

JOSEPH H. HOLLANDS, *Clerk.*

Notice of Appeal to Court of Appeals.

New York Supreme Court, County of Albany, Appellate Division, Third Department.

In the Matter of the Application of LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

Please take notice that the applicant herein, the Long Sault Development Company, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered and filed in the office of the Clerk of the said Appellate Division on the 20th day of October, 1913, a certified copy

of which order was filed in the office of the Clerk of the County of Albany, on the 24th day of October, 1913, and which said
69 ordered affirmed the order entered in the office of the Clerk of the County of Albany on the 20th day of February, 1913, and said applicant appeals from each and every part of the aforesaid order.

Dated, New York, November 3rd, 1913.

STRONG & CADWALADER,
Attorneys for Applicant.

Office & Post Office Address, 40 Wall Street, Borough of Manhattan, New York City.

To Hon. Thomas Carmody, Attorney General, Attorney for Respondent, Albany, N. Y.

Wm. J. Crattan, Esq., Clerk, Albany, New York.

70 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Third Department.

106/10 and 11.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK ex-Rel. G. WILSON BALL for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

Argued May, Term, 1913.
Decided Sept. Term, 1913.

SMITH, P. J.; KELLOGG, LYON, HOWARD, WOODWARD, Associate Justices.

Appeals from two orders of the Supreme Court Albany County, entered respectively February 20, 1913, and March 8, 1913, in the clerk's office of said county, which orders denied the application of the Long Sault Development Company and the relator G. Wilson Ball for writs of mandamus as a matter of right and not of discretion.

Appearances:

For Appellant-Applicant, Long Sault Development Co., Strong & Cadwalader, Henry W. Taft, of Counsel.

For Appellant-Applicant, G. Wilson Ball, Clarence S. Ferris, Henry W. Taft of Counsel.

For Respondents, Thomas Carmody, Attorney-General.

SMITH, *P. J.:*

The orders appealed from denied writs of mandamus to
71 compel the State Treasurer to accept from the Long Sault Development Company $25,000 tendered him pursuant to the provisions of Chap. 355 of the Laws of 1907, which was a special act incorporating said company. The first application was by the company and immediately upon the refusal of the writ asked for a similar application was made by a taxpayer which was also refused. The act of incorporation was entitled "An act to incorporate Long Sault Development Company and to authorize said company to construct and maintain dams, canals, power houses and locks at and near Long Sault Island for the purpose of improving the navigation of the St. Lawrence River, developing power from the waters thereof, and to construct and maintain a bridge and carry on the manufacture of commodities." The act conferred upon the company general corporate powers and a special right to erect dams and power houses and to use the waters of the St. Lawrence River in the vicinity mentioned for the purpose of generating power. The act provided for the payment of certain fixed sums to the State amounting to $15,000 for the year 1910 and $20,000 for the year 1911. After 1911 the company was required to pay certain rates estimated upon the average amounts of horse power generated during the year, or if such a rate should amount to less than $25,000 then this sum should be due and payable for such year. The company has expended large sums in surveys, in obtaining land and in preliminary development work, but has never constructed any dams or generated any power. On or about January 21, 1913, the company tendered to the State Treasurer the sum of $25,000 in payment for the amount due by it to the State for the year 1912. This sum the State Treasurer declined to accept and the two mandamus proceedings were thereupon instituted. The grounds of the refusal of the State Treasurer were, as stated by him at the time, that he had been advised by the Attorney General that the statute under which the payment was assumed to be made was "unconstitutional and void."

After these appeals had been taken and while they were still
72 pending two bills were passed by the legislature, being Chaps. 452 and 453 of the Laws of 1913, and which became laws with the approval of the Governor May 8, 1913. The first act repeals the act incorporating the Long Sault Development Company and provides the sum of $36,320 for the purpose of repaying to said company all sums paid by it to the State, and the second act confers jurisdiction upon the Board of Claims to hear and audit any claims presented by the said company against the State by reason of the repeal of its charter. The various provisions of these different acts will be considered at length later.

The Attorney General insists that mandamus will not lie inasmuch as the petitioner and relator have suffered no legal damages, that the refusal of the State Treasurer to accept the sum mentioned indicated at the most merely a policy of the State to question the legal status of the appellant company, but could not affect its right if any under its charter, inasmuch as a valid tender had been made. Ap-

pellant's charter conveyed water rights only as far as the Canadian boundary line in the St. Lawrence River and also contemplated co-operation on the Canadian side with a Canadian corporation. As no dam could be erected in the river on the American side without the consent of the Federal Government the State franchise granted by the original incorporating act was practically worthless without such consent. Section 9 of the act required the company to begin the work of constructing the dam within one year after Congress should authorize such construction, and the company at the time of the instituting of these proceedings was still endeavoring to obtain the consent of Congress to its project, but had not succeeded. It is thus evident that the act of the State Treasurer in all probability would operate as a very considerable obstacle to the company's success with the Federal Government, as Congress would not be apt to consider favorably the claims of the corporation operating under a State charter which the State authorities declined to recognize as constitutional. The act of the State official constituted a
73 cloud upon the title of the company's franchise and the mandamus proceedings brought by the company were in effect to remove this cloud, although primarily to compel an official to perform a ministerial act. We see no reason why mandamus will not lie to effect such results. The performance of a ministerial duty by a public officer may be enforced by mandamus (People ex rel. Harris v. Commissioners, 149 N. Y., 26, 31.) It has been held that a tax officer may be compelled by mandamus to accept certain sums in payment of the arrears of taxes, although the statute of limitations has run against such payments, as there is no presumption of payment by lapse of time, and the owner therefore has the right to have this lien or cloud on his title removed (People ex rel. Townshend v. Cady, 50 Supr. Court, 399; aff'd. in 99 N. Y., 620). If the appellant company were not entitled to mandamus, it would seem that the appellant relator was entitled as a taxpayer to compel a State officer both to do his duty and to collect all sums due to the State.

But mandamus can not be granted to compel an officer to act under a law that is unconstitutional and the constitutionality of the act incorporating this company is thus directly raised by these proceedings. The Attorney General in December, 1912, pursuant to a request by the Senate submitted to it an opinion as to the constitutionality of the special act incorporating this company, in which he declared it unconstitutional on four grounds. On January 13, 1913, the Governor sent a message to the legislature urging the repeal of said act for the same reasons and these several grounds are repeated in practically the same language in the act repealing the special act. These grounds are as follows:

First. That the act "contravenes Sec. 18 of Art. III of the State Constitution, which provides that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." In Matter of Union Ferry Co., 98 N. Y., 139, where
74 an act enabled the company to acquire by condemnation an additional ferry slip in the East River, Judge Rapallo, in

writing the opinion of the Court upholding the constitutionality of the act, says at pages 153, 154, "The exclusiveness prohibited is one which is created by the nature of the grant, not that which results from the nature of the property or right granted." So in the case at bar the only exclusiveness in the act is that created by the nature of the property or right granted. Obviously it would be as difficult to grant to several corporations the right to build a dam at a certain point and to develop water power thereby as to grant to several the right to build a ferry slip at a certain point. Judge Rapallo's reasoning and the long continued custom of the State in granting bridge and ferry and dam privileges seem clearly opposed to respondent's arguments on this point.

Second: "It violates Sec. 7 of Art. VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands and shall not be leased, sold or exchanged, or taken by any corporation, public or private." The incorporating act provides that the bed of the St. Lawrence River to be occupied by the works to be constructed by the Appellant company shall, after the Federal Government has authorized such construction, and upon the application by said company, be conveyed to it upon the payment of the sum of $10,000 to the State. The State now claims that the bed of the river thus to be conveyed is included within the Forest Preserve as defined by Sec. 100 of Chap. 332 of the Laws of 1893. The land which the State is authorized to convey to the appellant company lies under the waters of the river and between the uplands and the international boundary line. At the location of the proposed works there is no wild forest land whatever. The uplands are cultivated and have been for a number of years. There are no extensive forests in the vicinity and no State lands for a number of miles back from the river. Said Sec. 75 100 specifies all lands owned by the State within certain counties, with certain exceptions, as being a part of the Forest Preserve, but we do not think that the intent was thereby to include lands lying under the water in the St. Lawrence River which are separated by many miles from the lands above water owned by the State in this county. The Constitutional provision refers to the lands of the Forest Preserve as "wild forest lands" and while this description might include lands under water owned by the State adjoining such "wild forest lands" it would hardly seem to include other lands under water at a distance from any forests whatever.

Third: "The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of Art. III, Section 16 of the State Constitution, which provides that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act hereinbefore quoted, although it mentions the construction of a bridge, does not refer to any right to collect tolls for passage thereover, which right, however, is given by Sec. 3 of the act. But we think that the reference to a bridge in the title gives sufficient notice of the contents of the bill so as not to mislead any one examining the title. The right to collect tolls would naturally follow the right

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to construct a bridge, not a railroad bridge, and is so incidental thereto as not fairly to constitute a different "subject" so that it must be expressed in the title to conform to the Constitution. The same line of reasoning would apply to the right given to become the owner of State lands under water. This right has been frequently given in connection with franchises for dams in this State although some private dams have been built upon State lands and so seems incidental to the subject of the construction of the dam rather than a distinct subject by itself. But if otherwise there seems to be no reason why the parts of the act referred to may not be stricken out and the remainder of the act be held constitutional. In Matter
76 of New York & Long Island Bridge Co., 148 N. Y., 540, at pages 553, 554, Judge Bartlett in delivering the opinion of the Court says: "The general principle of construction is well settled that where an act deals with a subject not expressed in its title, and the void provisions are separable from those that are lawful, and that which remains is capable of being executed and stands complete in itself, it may be treated as constitutional." The special features of the present act which are objected to as not being properly expressed in the title are not absolutely necessary, as we view it, to the operations of the appellant company and so may if necessary be eliminated and the balance of the act be held constitutional.

Fourth: "The act is invalid as being in excess of the powers of the legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the lands in the bed of he St. Lawrence River * * *." As to whether the State can convey to a private corporation for private uses its title to the bed of a navigable stream which it holds by a sovereign right would seem to be a matter of considerable doubt. It may be noted, however, that this has been done by the State at least several times in recent years in connection with various power projects by private corporations so that possibly it is now too late to question the existence of such a right however much the policy may be criticised. Moreover the title of the incorporating act states as a purpose the "improving of navigation of the St. Lawrence River," and as this would be the effect of the building of the dam and lock proposed it might possibly be held that this incidental public purpose is sufficient to validate the ceding of State lands under water (Hazen v. Essex Co., 12 Cushing (Mass.), 475, 477, 478). If, however, this feature of the act should be held unconstitutional we think that the remainder of the act may still be upheld. This reasoning would also uphold the balance of the act if our holding upon the
77 second ground as to the Forest Preserve is question. (See Matter of Village of Middletown, 82 N. Y. 196, 202; People v. Kenney, 96 N. Y. 294, 302, 303).

Assuming then that the act of incorporation in question was at least in its main features constitutional and that mandamus was a proper remedy of both the appellant company and the relator, the question then arises as to what if any change has been created by the repealing act. In discussing this question it will be further assumed that while the legislature under its reserved power has the right to dissolve the corporation it has not the right to confiscate

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its franchises. This was determined in People v. O'Brien, et al., 111 N. Y. 1. Under its sovereign right to condemn all property within its borders for the public use, it may condemn appellants' franchises theretofore given if it conforms to the constitutional requirement by paying just compensation. This act purports to repeal the original act of incorporation upon the four grounds hereinbefore mentioned, but also states in Sec. 4 "The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal." If therefore the act can be sustained upon any grounds whatever it must be held valid as every presumption is in favor of the constitutionality of every declaration of legislative intent. We are of opinion that the repealing act together with the accompanying act passed upon the same date constitute in effect an attempted condemnation of the special franchise granted to the appellant company by the special act of incorporation. The legislature has in effect said that if the original act of incorporation be unconstitutional we have given nothing or take back what was thus illegally granted; if on the other hand that act was constitutional and gave to the company thereby formed some vested rights, we nevertheless take back what we then gave you and will pay you your damages to be adjusted by the Court of Claims. The State has in this adopted the same procedure as is adopted in condemnation of all land or property for
78 canal purposes. The compensation is provided for sufficiently to meet constitutional demands. In general the law of eminent domain can be invoked to take private property only for a public use. If this legislation which we thus construe as amounting to condemnation proceedings by special acts had stated therein as its purpose that this franchise was to be taken for a public use such a statement of purpose would probably have been sufficient upon which to base a judicial determination, in the absence of proof to the contrary, that the purpose was in fact a public one and the right of eminent domain properly invoked. (Hazen v. Essex Co., supra, 475, 477; United States v. Gettysburg Electric Railway, 160 U. S. 668, 680; Walker v. Shasta Power Co., 160 Fed. 856, 859; Jacobs v. Water Supply Co., 220 Penn. St. 388, 393; Sexauer v. Star Milling Co., 173 Ind. 242, 347. See also Matter of Niagara Falls & Whirlpool Railroad Co., 108 N. Y. 375, 386; Ulmer v. Railroad Co., 98 Me. 579, 591).

But it has also been held that when the legislature by giving the right of eminent domain in a particular instance thus impliedly declares that the purpose for which condemnation is to be sought is a public one the courts will give great weight to such a legislative declaration. (Dietrich v. Murdock et al., 42 Mo. 279, 283, 284; Town of Rensselaer v. Leopold, 106 Ind. 29, 32; Tanner v. Tread. T. M. & R. Co., 35 Col. 593, 597; Westport Stone Co. v. Thomas, 175 Ind., 319, 321, 322, 325. See also 22 L. R. A., New Series, note, page 173). In the case of an act repealing for abuse the charter of a company incorporated by special act where the preamble of the repealing act was defective and omitted important facts it was held that every presumption was in favor of the constitutionality of the repealing act and that accordingly the court would "presume the

existence of every fact upon which the validity of the law depends." (Erie & North-East R. R. v. Casey, 26 Penn. St., 287, 303, 317, 318, 323). See also a similar Massachusetts case of a revocation of a charter by the legislature by special act where the court said,
79 "We are bound to presume that the contingency, upon which the right to exercise it depended, has happened." (Crease v. Babcock, 23 Pick., 334, 344). A further principle seems well established and this is that "the use will be scrutinized less closely when the property is vested in the State or some public agency, than when it is vested in a private corporation." (Lewis on Eminent Domain, 3rd Ed., page 499. See also United States v. Gettysburg Electric Railway, cited supra, at page 680.) The note on page 173 of 22 L. R. A., New Series, reads as follows: "If the State itself requires for its own use private property, and essays, through public officers, to take it for itself, the courts decline to consider any question but that of compensation to the owner." It has also been held that "The question whether the exercise of the right of eminent domain is to be denied or withheld is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence aliunde showing the actual purpose in view." (Walker v. Shasta Power Co., cited supra, at page 860, citing Matter of Niagara Falls & Whirlpool Railroad Co., cited supra).

Within the foregoing principles and authorities we think that the legislature, in enacting the repealing act here construed as an attempted condemnation by the State of a special franchise already granted by special act, must be presumed to have had in view a public purpose, and that such presumption must prevail so as to validate the act of repeal unless a contrary purpose be affirmatively expressed or shown. We lack any affirmative proof in the record as to just what particular public use or uses the legislature had in mind upon this occasion, but obviously there are a number of possible public uses that would justify the State in seeking to regain its rights in the waters of the St. Lawrence at the point in question. The purpose of a public park or the improvement of navigation would undoubtedly give to the State the right of eminent domain.

But, although there is no public use stated in the condemna-
80 tion acts, we may fairly take judicial notice of the various acts of both the legislative and executive branches of the State government at the time of the passing of these acts, in order to ascertain if possible the real purpose lying back of their passage. In 1911 the conservation law was passed as Chap. 647 of the laws of that year. The conservation commission thereby created was directed in Sec. 21 of the act to investigate the water resources of the State "for the conservation, development, regulation and use of the waters in each of the principal water-sheds of the State with reference to the accomplishment of the following public uses and purposes: * * * 4. The development, construction and utilization of water power in the water-shed and to create a revenue for the State." In his message of January 13, 1913, already referred to, the Governor in urging upon the legislature the repeal of the charter of the appellant company states that not only is the special

act unconstitutional for the four reasons already discussed by us, but that its provisions "are in other respects improvident, unwise and indefensible," and quotes at length from the report of the State conservation commission as follows: "The vast power available at this place constitutes one of the State's greatest natural resources. The advances in the art of electrical transmission make it economically feasible to use the same throughout the State. At present it is going to waste. It is for the interest of all that this power should be developed and utilized by the people and for the people. Cheap power will enlarge the use of electricity for domestic and commercial purposes; stimulate industry; increase our wealth and add to our population. Private interests should not be allowed to exploit and monopolize the same. The State should develop this power for the benefit of the ultimate consumer." The message then states that the full economic development of the Long Sault rapids will produce one million horse power, refers to the great value to the State and the people of such power, and concludes: "In order that
81 we secure for all our citizens the many and the lasting beneficial results of the proper development of our natural resources, particularly of our now unused water powers, in accordance with our conservative policy in these matters, to which our State now stands committed, I respectfully recommend that Chap. 355 of the Laws of 1907—the Long Sault Development Company's charter—be immediately repealed." In his memorandum of approval of the repealing act the Governor further states that the repeal "will secure to all our citizens the beneficial results of the proper development of our natural resources, particularly of our now unused water powers, in accordance with the constructive policy of real conservation to which the State of New York now stands committed." There accordingly seems to be no doubt that the object of the Governor in securing the repeal of the Long Sault Company's charter was to reclaim for the people a valuable water power site with the idea that such site would ultimately be made use of by the people, as distinguished from a private corporation, for the generation and distribution of electric power. That the legislature shared in this purpose seems evident by their passage of the repealing act, even although the repeal is specifically based solely upon the ground of the unconstitutionality of the original act of incorporation, but with the saving clause of Sec. 4 mentioned. The question of the water power of the State being developed for the direct benefit of the people of the State was being favorably considered by the legislature at the time of the passage of the Long Sault repealing act, as is shown by the fact that at least two bills amending the conservation law were prominently before the legislature. Both bills provided for the State utilization of water powers and contained condemnation provisions. Of these the Murtha-Patrie bill passed both houses, but was vetoed by the Governor on various grounds, including among others the ground that the State should begin its policy of water development at the Long Sault rapids.

82 The purpose of the legislature in enacting the repealing act being thus fairly shown to be for future power generation

by the State from public waters, we are not prepared to hold that such a proposed use is not a public one. This question does not appear ever to have been decided in this State, but in some jurisdictions it has been held that the generation of electric power by water for sale to the public on equal terms is a public use (Walker v. Shasta Power Co., supra, at page 859) and some authorities seem to hold that the development of water power even for private consumption is such a public purpose as to justify the exercise of the right of eminent domain. (Haven v. Essex Co., supra, at pages 477, 478; 22 L. R. A., New Series, note, pages 137-151.) Without going to the extent of this latter case, which may be questioned on principle, we see no reason why the furnishing by the State of electric power generated by the State waters to the public upon equal terms would not be properly a public use, especially as the cases seem to hold that this same business if engaged in by a private corporation would be a public one. Available water power sites in any State must always be limited in number and will probably increase in value with the progressive exhaustion of near-by coal deposits. The navigable waters of the State are primarily owned by the public, and if a State in furtherance of a policy of conservation decides to retain or regain all its rights therein and ultimately to use such waters for power generation such a policy seems to us clearly public in its nature, so that the right of eminent domain may be invoked.

A single question remains whether the repealing act was in fact invalid as not having the requisite number of votes. The act is stated to have been passed "three-fifths being present." The appellant company now claims that the act is void as in violation of Sec. 20 of Art. III of the Constitution, which requires the assent of two-thirds of the members elected "to every bill appropriating public moneys or property for local or private purposes." It is admitted that the original act incorporating the appellant company was a private bill and it is now claimed that the repealing act which provides for the payment of certain public moneys is likewise a bill appropriating public moneys for a private purpose. To this, we cannot assent. If the general purpose of the repealing act is, as it appears to us, presumptively a public one by enabling the State to regain possession of a valuable water power, any moneys necessarily to be expended to secure such result must be regarded as appropriated for a public use. As we have heretofore held, the State has the right to exercise its right of condemnation as regards the special franchises of this company. But this right could be exercised only upon making due compensation, which would of necessity include a return of moneys already received by the State from the company. The repayment of such moneys is therefore a simple act of justice to compensate for the property taken. It is a part of the condemnation proceedings by the State as provided for by the two acts of May 8, 1913, and as such "is but a part of its legitimate functions and duties as a sovereign and the purpose in such case would seem to be public." (Waterloo Woolen Manufacturing Co. v. Shanahan, 128 N. Y. 345, 360).

83

The two orders appealed from should be affirmed without costs however, as they are here sustained by matters arising after the appeals were taken and in fact argued.

All concur, except Kellogg, J., dissenting in memorandum in which Howard, J., concurs.

84 *Dissenting Opinion.*

106/10 & 11.

KELLOGG, J., Dissenting:

I agree with the presiding Justice that the original Act creating the Long Sault Development Company was in most respects constitutional, and that the State Treasurer should have accepted the tender. I dissent from the determination that the repeal was in any way a condemnation of the property under the power of eminent domain.

Many times we are left in doubt as to the legislative intent. In this case, the Legislature has declared its intent and bases the repeal solely upon the ground that the original act was unconstitutional. There is no suggestion that it intended to appropriate the property of the Company for public use. It sought to repeal the grant of rights which it had made to the Company and, as a matter of fairness, felt bound to reimburse it for the expenditures it had made under the Act.

The provision that the enumeration of the grounds for the repeal shall not qualify or impair the force of the repeal means simply that the repeal is absolute, whether the grounds stated are good or bad. It doesn't mean that we can ignore the declared intent of the Legislature and find a legislative intention directly opposite to that expressed in the act.

The Legislature declared in plain words the reasons which impelled it to make the repeal, but declared that the repeal should be effective in any event. An attempt by the State to recede from its contract cannot be construed into appropriating property under its power of eminent domain.

The Company had some right under the grant. The Act creating the Company granted to it certain rights, so far as the State had the power to make much grant and the Company was to make annual compensation for such grant. The fact that the grant is not as broad and as effective as its terms imply is no reason why
85 the State can recede from it. It might furnish ground for the Company to seek to be relieved from paying the purchase price that the State cannot legally transfer what it undertook to grant. The fact that the Company is getting less than the contract contemplated it should get is no reason why the State can refuse to receive the consideration.

We may assume that the Legislature had the power to repeal the charter of the corporation, but it cannot, by repeal, take away the vested rights. We need not consider whether the Company has sufficient life to continue this proceeding, as the complaint of the taxpayer may well be heard and the Court may well act upon it.

The mandamus should therefore issue, leaving it to be determined in a proper way and proper manner what right the Company, or a trustee appointed to receive its assets, may have.

86 *Waiver of Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing papers consist of true and correct copies of the notice of appeal to the Court of Appeals, of the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department being the order appealed from, of the opinion of the said Appellate Division and of the dissenting opinion thereof and of all the papers on which the Court below acted in making the order appealed from and now on file in the office of the Clerk of Albany County; and that the certification of the same in accordance with the provisions of Section 1315 of the Code of Civil Procedure, or otherwise, be and the same hereby is waived.

Dated, Albany, N. Y., November 26th, 1913.

STRONG & CADWALADER,
Attorneys for Appellant.
THOMAS CARMODY,
Attorney General of the State of New York,
Attorney for Respondent.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Papers on Appeal with the original thereof, filed in this office on the 27th day of June 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

87 COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 9th Day of June, in the Year of our Lord One Thousand Nine Hundred and Fourteen, Before the Judges of said Court.

Witness the Hon. Willard Bartlett, Chief Judge, Presiding. R. M. Barber, Clerk.

Remittitur, June 10th, 1914.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer, &c.

Be it remembered, That on the 28th day of November in the year of our Lord one thousand nine hundred and thirteen Long Sault Development Company, the appellant in this proceeding, came here into the Court of Appeals, by Strong & Cadwalader, its attorneys and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And John J. Kennedy, as Treasurer, &c., the respondent in said proceeding, afterwards appeared in said Court of Appeals by Thomas Carmody, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

88 Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry W. Taft of counsel for the appellant, and by Mr. Thomas Carmody of counsel for the respondent, and briefs having been submitted by Lawyers Title Insurance Co. and ano., Intervenors, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

89 COURT OF APPEALS,
Clerk's Office:

ALBANY, June 10th, 1914.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

And afterwards the order attached hereto was duly entered:

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Remittitur with the original thereof, filed in this office on the 27th day of June, 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

90 [Endorsed:] Supreme Court. In the Matter of the Application of The Long Sault Development Company for a Writ of Mandamus against John J. Kennedy, as Treasurer of the State of New York. Copy. Remittitur. A copy of the within paper received this day by mail. Jul- 1, 1914. —— ——, Attorney for —.

91 At a Court of Appeals for the State of New York, Held at the Capitol in the City of Albany, on the 14th day of July, 1914.

Present: Hon. Willard Bartlett, Chief Judge, Presiding.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

An order to show cause having been granted by the Hon. Willard Bartlett, Chief Judge of this Court, requiring the respondent to show cause why this court should not make an order requesting the Supreme Court of the State of New York, in and for the County of Albany, to return the remittitur herein to this court, and upon the return thereof, amending the same in a manner as in said order to shown cause is more fully stated, and the motion upon said order to show cause regularly coming on to be heard,

Now, on reading and filing the order to show cause, aforesaid, dated the 8th day of July, 1914, and the affidavit of Henry W. Taft, verified the 8th day of July, 1914, and after hearing Strong & Cadwalader counsel for the appellant in support of said application and Thomas Carmody, Attorney General, attorney for the respondent State Treasurer, appearing and not opposing, and due deliberation having been had, it is

Ordered that the Supreme Court of the State of New York,
92 in and for the County of Albany, be and it is hereby requested to return the remittitur herein to this court; and that upon the return thereof the said remittitur be and the same is hereby amended by adding thereto and incorporating therein the following statement.

Upon the argument of the appeal in this cause before the Court of Appeals, there was submitted to the court, by counsel for the appellant and in its behalf, a brief containing the following points:

(Page 23.)

Point II.

"Chapters 452 and 453 of the laws of 1913 cannot reasonably be construed to constitute an authorization for the taking by right of eminent domain of the special franchises of the Long Sault Development Company; and, even if they could, they would be in conflict with article I, section 6, of the state constitution, because they do not provide for 'just compensation,' and also in conflict with the fourteenth amendment of the federal constitution because they would be an attempt to deprive the company of its property without 'due process of law.'"

(Page 48.)

Point III.

"Chapters 452 and 453 of the laws of 1913, if regarded as an attempted condemnation of the special franchises of the Long Sault Development Company, would be unconstitutional in that such franchises were not taken by the state for public use."

93 "The Fourteenth Amendment declares that:

"No State shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(Page 87.)

Point VII.

"The duty of the State Treasurer to accept the payment due for the year 1912 is not ended by the repealing act. That part of chapter 355 of the laws of 1907, which granted to the Long Sault Company the right to construct and maintain in the St. Lawrence River

a dam and other works, vested in it property rights, which could not be and have not been destroyed by the repealing act of 1913. The writ of mandamus to compel the State Treasurer to perform his statutory duty was sought by the corporation for the protection of these property rights and the necessity for such protection still exists. The writ should, therefore, be issued."

* * * * * * *

(Page 88.)

"In dealing with this subject it is necessary to revert to the decision in the leading case of People vs. O'Brien, 111 N. Y., 1, in which an act of the legislature dissolving the Broadway Surface Railroad Company was sustained as constitutional, but only so far as it deprived the Company of the right to exist as a corporation. To that extent the repealing act was held to be a proper exercise of the power reserved by the State to alter, amend or repeal the charter of a corporation. But the court further held that the special franchise which had been granted to the corporation to maintain tracks and operate cars on Broadway survived the repealing act, being a property right created by contract with the State and protected by the provisions of the Federal Constitution. The court said on this point,

page 36."

94 "Whatever might have been the intention of the Legislature, or even of the framers of our constitution, in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution. * * * But we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors through the exercise of the reserved power of amendment and repeal."

* * * * * * *

(Page 98.)

"A consideration has been paid for the grant of the franchise and the grant constitutes a contract. In Fletcher vs. Peck, 6 Cranch, 87, where it was sought to set aside a conveyance of public lands made pursuant to an Act of the Legislature of the State of Georgia, Chief Justice Marshall said:

'A contract is a compact between two or more parties and is either executory or executed. * * * A contract executed as well as one which is executory contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor; it implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

'Since then in fact a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to com-

prehend the latter as well as the former. A law annulling conveyances between individuals and declaring that the grantors stand seized of their former estates notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances.'

* * * * * * *

(Page 100.)

"Whether, therefore, the special act of incorporation be regarded as an executory contract or an executed contract, it yet amounts to a completed grant, which the grantor is powerless to cancel without violating the constitutional provision prohibiting the enactment of State laws impairing the obligation of contracts."

95 "The State cannot, therefore, terminate its contract obligations by returning the moneys already paid to the State. Section 2, of the Repealing Act, directing the repayment to the corporation of such moneys, is an attempt to treat these obligations as terminable at the election of the State. But a forfeiture of contractual and property rights protected by the Federal Constitution cannot be effected in any such summary manner (See People vs. O'Brien, 111 N. Y., 1; Rochester Turnpike Co. v. Joel, 41 App. Div., 43, and Colby vs. Equitable Trust Co., 124 App. Div., 262-266). Payments made by the Long Sault Development Company and received without protest by the State, constitute a consideration for the franchises acquired, and they justified the corporation in proceeding to make large expenditures upon the faith of the obligations assumed by the State. As was stated by Cullen, C. J., in Heerwagen vs. Crosstown Street Railway Company, 179 N. Y., 99, at page 103, in considering the effect of payments made by the Street Railroad corporation for its franchise: 'The payments the defendant agreed to make were the consideration of the acquisition of valuable property rights which would survive its corporate existence and possess all the ordinary attributes of property.'"

(Page 104.)

Point VIII.

"The court must necessarily pass on the constitutionality of chapter 355 of the laws of 1907 in passing on this application for a writ of mandamus."

(Page 156.)

Point XII.

"The State has the power to convey lands under the waters

96 of the St. Lawrence River to be used for the purposes mentioned in the act. The fact that the title of the State is held by virtue of its sovereign right and in trust for the benefit of the

public, does not preclude it from divesting itself of the title for public purposes, such as the improvement of navigation by the building of a dam and the conservation of water-power created by such improvement."

* * * * * * *

(Page 159.)

In the leading case of Langdon vs. The Mayor, 93 N. Y., 129, there was the familiar case of a grant by the State of land under water for the building of a wharf. This transfer was held to be valid. The Court, in deciding the case, said: * * *

"'If the grant to Astor had been made directly by the legislature or by the commissioners of the land office, under its authority, it would have been inviolable as a contract within the protection of the Federal Constitution, the obligation of which no legislative act could impair (Fletcher vs. Peck, 6 Cranch, 136). It matters not that the grant would limit the power of the State in the exercise of its sovereignty over the public waters, and would so far limit and control future legislatures. The same is true of all grants by the State of any part of the public domain. When valid grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation.'"

And it is further

Ordered that upon the amendment of the remittitur as aforesaid it be returned to the Supreme Court in and for the County of Albany.

A Copy.

[Seal County of Albany, July, 1841.]

[SEAL.] R. M. BARBER, *Clerk.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Amended Remittitur with the original thereof, filed in this office on the 27th day of June 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

97 [Endorsed:] Court of Appeals of the State of New York. In the Matter of the Application of the Long Sault Development Company for a Writ of Mandamus against John J. Kennedy as Treasurer of the State of New York. Order. Amended Remittitur. Strong & Cadwalader, Attorneys for Applicant in Error, 40 Wall Street, New York City. Filed July 14, '14.

96 At a Special Term of the Supreme Court, Held in and for the County of Albany, at City Hall, in the City of Albany, on the 27th Day of June, 1914.

Present: Hon. William P. Rudd, Justice.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY as Treasurer of the State of New York.

The above named Long Sault Development Company having appealed to the Court of Appeals of the State of New York from the final order herein of the Appellate Division of the Supreme Court, Third Department, entered and filed in the Office of the Clerk of the County of Albany on the 24th day of October, 1913, whereby it was ordered that the order of the Special Term, denying the application of the Long Sault Development Company for a writ of mandamus against John J. Kennedy as Treasurer of the State of New York, be affirmed; and said appeal having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and having further ordered that the record and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law; and said record and proceedings remitted from
99 that Court having been duly filed; and Homer D. Call having succeeded the said John J. Kennedy as Treasurer of the State of New York,

Now, on reading and filing the Remittitur of the Court of Appeals herein, and upon motion of Thomas Carmody, Attorney General, Attorney for Homer D. Call, as Treasurer of the State of New York, it is

Ordered that the said Order of the Court of Appeals be and the same hereby is made the order of this Court; and that the order entered herein on the 24th day of October, 1913, be and the same hereby is affirmed; and that judgment of this Court be entered affirming said Order with costs of appeal to be taxed against the Long Sault Development Company.

Enter.

WM. P. RUDD, *J. S. C.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Order with the original thereof, filed in this office on the 27th day of June, 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

100 [Endorsed:] Supreme Court. In the Matter of the Application of The Long Sault Development Company for a Writ of Mandamus against John J. Kennedy, as Treasurer of the State of New York. Copy Order Making Judgment of the Court of Appeals the Judgment of the Supreme Court. Thomas Carmody, Attorney-General, Attorney for Def't. Capitol, Albany, N. Y. A copy of the within paper received this day by mail, Jul- 1, 1914. —— ——, Attorney for —.

101 Supreme Court, County of Albany.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

Please take notice that the within Bill of Costs will be presented to the Clerk of Albany County for readjustment on the 6th day of July, 1914, at 10:30 o'clock in the forenoon of that day.

Dated Albany, N. Y., June 27, 1914.

THOMAS CARMODY,
Attorney-General, Attorney for Respondent.

Office and Post Office Address, The Capitol, Albany, N. Y.

To Messrs. Strong & Cadwalader, Attorneys for Appellant.

102 STATE OF NEW YORK:

Supreme Court, County of Albany.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

Costs of John J. Kennedy, as Treasurer of the State of New York.

Costs.

Appeal to Court of Appeals, before argument	$30.00
Appeal to Court of Appeals, for argument	60.00
Disbursements	89.67
Total Costs and Disbursements	$179.67

Disbursements.

Clerk's Trial Fee		$.5
Clerk filing Execution and Entering Satisfaction		.2
Sheriff's Fee on Execution		.7
For printing Points in above proceeding and also in People ex Rel. Ball v. Kennedy	78.75	
For printing supplemental brief	9.45	
		88.2
		$89.6

103 STATE OF NEW YORK,
County of Albany, ss:

Claude T. Dawes, of said county, being duly sworn, says he is Deputy Attorney in the Office of the Attorney-General, the attorney in the above entitled action; that the items of disbursements above mentioned are, as deponent believes, correct and true; are reasonable in amount, and have been or will be actually and necessarily incurred in this action on the part of said John J. Kennedy, as deponent verily believes.

CLAUDE T. DAWES.

Sworn to before me, this 27 day of June, 1914.

WM. M. THOMAS,
Notary Public.

Taxed at $179.67 this 27 day of June, 1914.

WM. J. GRATTAN, *Clerk.*

Re-taxed at $179.67 this 6th day of July, 1914.

WM. J. GRATTAN, *Clerk.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Bill of Costs with the original thereof, filed in this office on the 27th day of June, 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

104 SIR: Take notice that the within is a copy of bill of costs duly taxed in the office of the Clerk of Albany County, on the 27th day of June, 1914.

Yours, etc.,

THOMAS CARMODY,
Attorney General.

[Endorsed:] Supreme Court. In the Matter of the Application of The Long Sault Development Company for a Writ of Mandamus against John J. Kennedy, as Treasurer of the State of New York. Copy Bill of Costs and Notice of Retaxation. Thomas Carmody, Attorney-General, Attorney for —. Capitol, Albany, N. Y. A copy of the within paper received this day by mail, Jul- 1, 1914. —— ——, Attorney for —.

105 Supreme Court, Albany County.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

The above named Long Sault Development Company having appealed to the Court of Appeals of the State of New York from the final order herein of the Appellate Division of the Supreme Court, Third Department, entered and filed in the Office of the Clerk of the County of Albany on the 24th day of October, 1913, whereby it was ordered that the order of the Special Term, denying the application of the Long Sault Development Company for a writ of mandamus against John J. Kennedy as Treasurer of the State of New York, be affirmed; and said appeal having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and having further ordered that the record and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law; and said record and proceedings remitted from that Court having been duly filed; and an order having been entered thereon making the order of the Court of Appeals the order of this Court and directing the entry of judgment of affirmance herein with costs of said appeal against the Long Sault Development Company; and said costs having been taxed by the
106 Clerk of this Court at the sum of $179.67 and Homer D. Call having succeeded ~~the said~~ John J. Kennedy as Treasurer of the State of New York.

Now, on motion of Thomas Carmody, Attorney-General, Attorney for Homer D. Call as State Treasurer, it is

Adjudged that the Order in these proceedings entered on the 24th day of October, 1913, be and the same hereby is in all things affirmed;

And it is further adjudged that said Homer D. Call as Treasurer of the State of New York recover of the Long Sault Development Company the sum of One hundred seventy-nine & 67/100 Dollars ($179.67), the amount of the costs herein as taxed, and that he have execution against said Company therefor.

Dated Albany, N. Y., June 27, 1914.

WM. J. GRATTAN, *Clerk.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Judgment with the original thereof, filed & recorded in this office on the 27th day of June 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

107 [Endorsed:] Supreme Court. In the Matter of the Application of The Long Sault Development Company for a Writ of Mandamus against John J. Kennedy, as Treasurer of the State of New York. Copy Judgment entered on remittitur of Court of Appeals. Thomas Carmody, Attorney-General, Attorney for Def't, Capitol, Albany, N. Y. A copy of the within paper received this day by mail, Jul- 1, 1914. —— ——, Attorney for —.

108 Copy.

To Be Entered in Albany County.

At a Special Term of the Supreme Court Held in and for the County of Columbia, at Court House, in the City of Hudson, on the 17th Day of August, 1914.

Present: Hon A. V. S. Cochrane, Justice.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

The above named Long Sault Development Company having appealed to the Court of Appeals of the State of New York from the final order herein of the Appellate Division of the Supreme Court, Third Department, entered and filed in the Office of the Clerk of the County of Albany on the 24th day of October, 1913, whereby it was ordered that the order of the Special Term, denying the application of the Long Sault Development Company for a writ of mandamus against John J. Kennedy as Treasurer of the State of New York, be affirmed; and said appeal having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and having further ordered that the record and proceedings in that Court be

COPY BOUND

remitted to the Supreme Court, there to be proceeded upon according to law; and said record and proceedings remitted from that Court having been duly filed; and an order having been
109 entered thereon making the order of the Court of Appeals the order of this Court and directing the entry of judgment of affirmance herein with costs of said appeal against the Long Sault Development Company and said judgment with $179.67 costs of appeal against the Long Sault Development Company having been entered herein dated June 27, 1914 and afterwards to wit on July 14, 1914 a motion having been made on the return of an order to show cause by the attorneys for the appellant for an amendment of the remittitur herein so as to recite therein that the appellant had submitted to the Court of Appeals a brief containing certain points and said motion having been granted by the Court of Appeals after hearing Thomas Carmody, Attorney General, Attorney for Homer D. Call as Treasurer of the State of New York, in opposition thereto and the said remittitur having been amended in said respects; and Homer D. Call having succeeded the said John J. Kennedy as Treasurer of the State of New York,

Now, on reading and filing the said amended Remittitur of the Court of Appeals herein, and upon motion of Thomas Carmody, Attorney General, Attorney for Homer D. Call as Treasurer of the State of New York, it is

Ordered that the said Order of the Court of Appeals be and the same hereby is made the order of this Court; and that the order entered herein on the 24th day of October, 1913, be and the same hereby is affirmed; and that judgment of this Court be entered affirming said Order with $179.67 costs of appeal against the Long Sault Development Company.

Enter.

A. V. S. COCHRANE,
Jus. Sup. Ct.

I hereby consent to the entry of the foregoing order.
Dated, Albany, N. Y., Aug. 12, '14.

THOMAS CARMODY,
Att'y-Gen'l, Att'y for Respondent.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Order with the original thereof, filed in this office on the 19th day of August 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

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110 [Endorsed:] Copy. Supreme Court, Columbia County. To be entered in Albany County. In the Matter of the Application of the Long Sault Development Company for a Writ of Mandamus against John J. Kennedy as Treasurer of the State of New York. Order making judgment of the Court of Appeals the judgment of the Supreme Court. Strong & Cadwalader, Attorneys for Applicant in Error, 40 Wall Street, New York City.

111 Copy.

Supreme Court, Albany County.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

The above named Long Sault Development Company having appealed to the Court of Appeals of the State of New York from the final order herein of the Appellant Division of the Supreme Court, Third Department, entered and filed in the Office of the Clerk of the County of Albany on the 24th day of October, 1913, whereby it was ordered that the order of the Special Term, denying the application of the Long Sault Development Company for a writ of mandamus against John J. Kennedy as Treasurer of the State of New York, be affirmed; and said appeal having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and having further ordered that the record and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law; and said record and proceedings remitted from that Court having been duly filed; and an order having been entered thereon making the order of the Court of Appeals the order of this Court and directing the entry of judgment of affirmance herein with costs of said appeal against the Long Sault Development Company; and said costs having been taxed by the Clerk of this Court at the sum of $179.67 and judgment of affirmance
112 with $179.67 costs against the Long Sault Development Company, having been entered herein dated June 27, 1914, and afterwards to wit on July 14, 1914, a motion having been made on the return of an order to show cause, by the attorneys for the appellant for an amendment of the remittitur herein so as to recite therein that the appellant had submitted to the Court of Appeals a brief containing certain points and said motion having been granted by the Court of Appeals after hearing Thomas Carmody, Attorney General, Attorney for Homer D. Call as Treasurer of the State of New York, in opposition thereto, and the said remittitur having been amended in said respects, and an order having been entered on said amended remittitur making the order of the Court of Appeals the order of this Court and directing the entry of judgment

of affirmance herein with $179.67 costs of appeal against the Long Sault Development Company; and Homer D. Call, having succeeded the said John J. Kennedy as Treasurer of the State of New York,

Now, on motion of Thomas Carmody, Attorney General, Attorney for Homer D. Call as State Treasurer, it is

Adjudged that the Order in these proceedings entered on the 24th day of October, 1913, be and the same hereby is in all things affirmed;

And it is further adjudged that said Homer D. Call as Treasurer of the State of New York recover of the Long Sault Development Company the sum of one hundred seventy nine 67/100 dollars ($179.67) the amount of the costs herein as taxed, and that he have execution against said Company therefor.

Dated Albany, N. Y., August 19, 1914.

WM. J. GRATTAN, *Clerk.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Judgment with the original thereof, filed & entered in this office on the 19th day of August, 1914, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 19th day of August, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

113 [Endorsed:] Copy. Supreme Court, Albany County. In the Matter of the Application of the Long Sault Development Company for a Writ of Mandamus against John J. Kennedy as Treasurer of the State of New York. Judgment entered on amended remittitur of Court of Appeals. Strong & Cadwalader, Attorneys for Applicant in Error, 40 Wall Street, New York City.

114 Supreme Court of the United States.

In the Matter of the Application of THE LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus, Plaintiff in Error,
against
HOMER D. CALL, Successor of John J. Kennedy, as Treasurer of the State of New York, Defendant in Error.

Know all men by these presents: That we, Long Sault Development Company, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, Borough of Manhattan, in the City of New York, as Surety, are held and firmly bound unto Homer D. Call,

Successor of John J. Kennedy as Treasurer of the State of New York, in the sum of Five Hundred ($500.00) Dollars, to be paid to him and for the payment of which, well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eighth day of September, in the year of our Lord, one thousand nine hundred and fourteen.

Whereas, the above named Long Sault Development Company, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse a judgment lately rendered against the said plaintiff in error at a Supreme Court of the State of New York in a suit pending in said Court between Long Sault Development Company, as applicant, and John J. Kennedy, succeeded by Homer D. Call, as Treasurer of the State of New York.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of
115 error to effect and answer all costs and damages that may be adjudged, if it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

LONG SAULT DEVELOPMENT COMPANY,
By ARTHUR V. DAVIS, *President.* [L. S.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
S. FRANK HEDGES,
By WILLIAM H. ESTWICK, [L. S.]
Attorney-in-Fact.

Attest:

WILLIAM H. ESTWICK, [L. S.]
Attorney-in-Fact.

116 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Long Sault Development Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney in Fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Long Sault Development Company is the corporate seal

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of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney in Fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 21 day of Sep. 1914.

ALBERT J. ROWLAND,
Notary Public, New York County.

Notary Public, New York County, No. 8818, Register's No. 6115. Certificates Filed in Kings Registers No. 6060, Bronx No. 10. Registers No. 682, Queens, Richmond, Westchester, Nassau, Putnam, Orange, and Suffolk Counties. Term Expires Mar. 30, 1916.

117 [Endorsed:] Supreme Court of United States. In the Matter of the Application of the Long Sault Development Company for a Writ of Mandamus, Plaintiff in Error, against Homer D. Call, Successor of John J. Kennedy, as Treasurer of the State of New York, Defendant in Error. Copy. Bond on writ of error. Cadwalader, Wickersham & Taft, Attorneys for Plaintiff in Error, 40 Wall Street, New York City. The within undertaking is approved as to form and as to the sufficiency of the surety. Mahlon Pitney, Associate Justice Supreme Court of the United States. Fidelity and Guaranty Co., 47 Cedar Street, New York. Surety. October 5, 1914. [Filed in Albany County, Oct. 14, '14.]

118 STATE OF NEW YORK,
County of Albany, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of Albany.

I, William J. Grattan, Clerk of the County of Albany, and of the Supreme Court of the State of New York for the said County of Albany, by virtue of the annexed writ of error, which was served upon me on the 14th day of October, 1914, and in obedience thereto, do hereby certify

That the following pages, numbered from one (1) to 89 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit "In the Matter of the Applica-

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tion of the Long Sault Development Company for a writ of Mandamus, Plaintiff, against John J. Kennedy, as Treasurer of the State of New York, Defendant," mentioned in said writ of error, as the same remains of record and on file in my office, and that annexed thereto is the stipulation of attorneys, petition for said writ of error, excluding Exhibit "A" thereof referred to in said stipulation, assignment of errors, and citation to the writ of error with admission of service of the same, and said writ of error served upon me.

In witness whereof, I have caused the seal of the said Court to be hereunto affixed at my office in the City and County of Albany, on the 14th day of October, 1914.

[Seal County of Albany, July, 1841.]

WM. J. GRATTAN, *Clerk.*

119 EXHIBIT B.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY for a Writ of Mandamus
against
JOHN J. KENNEDY, as Treasurer of the State of New York.

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK ex Rel. G. WILSON BALL for a Writ of Mandamus against the same.

(Decided June 9, 1914.)

Appeal in each case by the petitioner from an order of the Appellate Division of the Supreme Court in the third department, entered on the 20th day of October, 1913, affirming as matter of law and not in the exercise of discretion an order of the Supreme Court in Albany county denying as a matter of right the petitioner's application for a writ of mandamus to compel the state treasurer to accept from the Long Sault Development Company the sum of $25,000 as a payment due to the state of New York under chapter 355 of the Laws of 1907.

The facts, so far as material, are stated in the opinion.

Henry W. Taft for the Long Sault Development Company, appellant.

Clarence S. Ferris for G. Wilson Ball, appellant.

Edgar M. Cullen and William N. Dykman on brief for intervenors, The Lawyers Title Insurance and Trust Company, The Title Guarantee and Trust Company and The American Sugar Refining Company of New York.

Thomas Carmody, Attorney-General, for the State Treasurer, respondent.

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WILLARD BARTLETT, *Ch. J.*:

The purpose of both of these proceedings is the same and they are substantially alike except that in one case the moving party is the Long Sault Development Company, the corporation directly interested, while in the other the petitioner is a taxpayer of St. Lawrence county, where the proposed works of the corporation are to be established. They were heard together in the Appellate Division and disposed of there as one case.

The order of the Special Term contains a declaration which might preclude a consideration of the appeal if it appeared also in that of the Appellate Division, to wit: "This order is not made after a consideration of the merits, but for the purpose of expediting a final decision upon the merits in the courts of appellate jurisdiction to which appeals herein may be prosecuted." It is contrary to the policy of our law to dispose of cases in this manner. Litigants are entitled to something more than a decision pro forma. Furthermore, a capable judge in the court of first instance ought not to deprive the parties or the appellate courts of the benefit to be derived from an actual consideration of the case on his part.

120 The purpose of this litigation is to test the constitutionality of an act of the legislature passed in 1907 to incorporate the Long Sault Development Company and grant it an important franchise on and in the St. Lawrence river. (Laws of 1907, chap. 355.) One of the conditions upon which the grant was made was the payment of $25,000 annually into the treasury of the state. On January 21, 1913, the Long Sault Development Company tendered the prescribed amount to the state treasurer, who declined to accept it on the ground that the attorney-general had pronounced the act of 1907 unconstitutional. These proceedings were then instituted; and after the applications had been denied at Special Term and while the appeals to the Appellate Division were pending the legislature repealed the act of 1907. (Laws of 1913, chapters 452, 453.)

The statute of 1907 is entitled "An Act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault Island, for the purpose of improving the navigation of the St. Lawrence River and developing power from the waters thereof, and to construct and maintain a bridge and carry on the manufacture of commodities."

It provides in the first section that five persons named therein and all who are or may be associated with them are thereby constituted a body corporate and politic under the name of the Long Sault Development Company, for the purpose of erecting, constructing, maintaining, operating and using, in connection with the St. Lawrence river, a dam or dams, a canal or canals, a reservoir or reservoirs, a power-house or power-houses, and works appurtenant thereto, at or near Long Sault island in the county of St. Lawrence, and of erecting a lock or locks and works appurtenant thereto at or near the same place, or for the development of electrical power and energy and the permanent improvement of navigation on the St. Lawrence river at

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and above and below said place; and also of constructing and maintaining a bridge upon or in connection with said works and of carrying on the manufacture of commodities with the said power.

General corporate powers are conferred upon the company by the second section. Then follows, in the third section, a declaration that said corporation shall have the right to construct, maintain, operate and use all such dams, canals, reservoirs, sluices, bulkheads, and appurtenant works as may be proper or useful to develop water power and electrical power therefrom, at such points on or adjacent to the south shore of the St. Lawrence river near Long Sault island or Barnhart's island as may be selected by said corporation (but not across the international boundary line unless consented to by the Dominion of Canada); and also in and upon so much of the
121 river and bed as lie south of the international boundary line in the same locality. The company is also given the right to erect and maintain power-houses; to take and use the waters of the river at and above the points of location of the authorized works; and to construct toll bridges over and in connection with the same, for foot passengers, animals and vehicles. These rights are declared to be granted upon certain specified conditions, the most important of which is "that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the St. Lawrence river, but, on the contrary, that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time."

The fourth section of the statute provides that after Congress shall have authorized the construction of the dams, locks and canals authorized by the act, and after the corporation has paid the fixed sum of $10,000 into the state treasury, then "the commissioners of the land office shall, upon the application of said corporation, grant unto it the title and interest of the people of the state in and to lands under the waters of the St. Lawrence river to be covered or occupied by said works and locks and power-houses;" in consideration of which conveyance, as well as of the rights and privileges granted by the act, the corporation shall make certain specified payments into the state treasury which shall amount to not less than $25,000 per annum after the year 1911.

The Long Sault Development Company was duly organized under the act, and developed a plan for the construction of the works thereby authorized in co-operation with a Canadian corporation owning power on the other side of the river—the St. Lawrence Development Company, Limited. In necessary preliminary work, the acquisition of lands and riparian rights, and the payment of taxes, the Long Sault Development Company claims already to have expended upwards of $750,000.

As is generally known, the celebrated Long Sault rapids constitute a substantial obstacle to the navigation of the St. Lawrence for commercial purposes, being navigated by only one line of passenger boats during the tourist season. In the petition in this proceeding

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the effects of the proposed scheme on navigation are summarized as follows:

"The river, which at Long Sault is now practically unnavigable, will become navigable for all classes of vessels. Both of the contemplated locks will be continuously operated during the navigation season toll free. Reliable and economical power will be made available within the radius of transmission of electricity from the
122 power houses. New industries will thereby be created. There will be increased quantities of products from manufacturing plants utilizing the power, which products must be distributed by boat or rail."

The first obstacle that confronts the appellants in this case is the repeal of the statute under which the petitioning corporation was organized and by which its franchises were acquired. The repealing act sets forth four grounds upon which the legislature deems the repealed act to be unconstitutional, but it adds that "The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal." (L. 1913, ch. 452, section 4.) This provision, as it seems to me, makes the repeal effective, irrespective of the reasons assigned therefor. The repeal, however, could not operate to confiscate any valid franchise of property right which the Long Sault Development Company had previously acquired under the act repealed. (People v. O'Brien, 111 N. Y. 1.) We are, therefore, called upon to consider and determine whether the legislature possessed the constitutional power to convey away the state control over the navigation of the St. Lawrence river to the extent attempted by the act of 1907.

The power of the legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day. (Lansing v. Smith, 4 Wend. 9; People v. N. Y. & Staten Island Ferry Co., 68 N. Y. 71; Langdon v. Mayor, etc., of N. Y., 93 N. Y. 129.) The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public. "For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the City of New York of the lands under water below the shore line around Manhattan Island clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city, and, consequently, of the people of the state. So, also, grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the state, have been held valid upon the same principle, as well as to corporations and private persons engaged in commerce or navigation for their necessary or reasonable use. Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the

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state may lawfully apply such lands." (Coxe v. State of N. Y., 144 N. Y. 396, 407.)

123 If the grant to the Long Sault Development Company fell within any of these classes it could not well be assailed. But in substance and effect it is very much broader. It virtually turns over to the corporation entire control of navigation at the Long Sault Rapids (provided, of course, that the consent of Congress can be obtained). All that the corporation must do is to construct the contemplated works, pay the stipulated sums and keep the navigation as good as it is now. No matter how much the interests of the public may demand the improvement thereof in the future, the state will be powerless to act either directly or by constraint upon the corporation. It is precisely as though the legislature should confer upon a corporation exclusive authority to construct works on the Hudson river to improve the navigation between Albany and Troy upon condition that such navigation shall be preserved in as good condition as the same is at present, and thereby preclude the state from ever hereafter improving the navigation itself. In my opinion the legislature cannot make such a contract in behalf of the state. In Illinois Central Railroad Co. v. Illinois (146 U. S. 387) the attempted alienation of 1,000 acres of the harbor of Chicago was condemned on account of the extent of the area granted. Here the grant is objectionable on account of the abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private corporation. In this discussion I assume that the improvement of navigation was a real, even if subsidiary, purpose of the enactment and not merely a cloak for a power development project. The point that I desire to emphasize is that the legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence to a private company to maintain and control navigation thereon, thereby parting for all time with its own power to improve such navigation. The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." (Illinois Central Railroad Co. v. Illinois, supra, p. 453.)

124 There are many other interesting features in this case; but it is not necessary to discuss them if I am right in the conclusion which has been stated. If the abdication of state control over the St. Lawrence as a navigable river at the Long Sault vitiates

the entire statute, as I think it does, it follows that neither the Long Sault Development Company or its successors in interest, if it be deemed dissolved, have any rights against the state or its officers to be enforced by mandamus or otherwise.

The orders appealed from should be affirmed, with costs.

COLLIN, *J.* (dissenting):

Appeal by the Long Sault Development Company from the order of the Appellate Division of the Supreme Court in the third judicial department, entered October 24, 1913, which affirmed, as a matter of law and not in the exercise of the court's discretion, an order of the Special Term which denied the application of the appellant for a writ of mandamus to compel the treasurer of the state of New York to accept $25,000 from the appellant in payment of the amount it alleged to be due from it to the state for the year 1912, under the provisions of chapter 355 of the Laws of 1907. After the argument in the appeal and pursuant to the permissive order of this court, an intervening brief in behalf of the Lawyers Title Insurance and Trust Company, the Title Guarantee and Trust Company and the American Sugar Refining Company of New York and an answering brief in behalf of the respondent were filed.

The chapter mentioned is entitled "An Act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities."

It will be necessary to state, in part, the substance of certain of its eleven sections. Section 1 created the appellant a corporation "for the purpose of erecting, constructing, maintaining, operating and using, in connection with the Saint Lawrence river, a dam or dams, a canal or canals, a reservoir or reservoirs, and a power-house or power-houses and works appurtenant thereto, at or near Long Sault island, in the county of Saint Lawrence, and of erecting and constructing a lock or locks, and works appurtenant thereto, at or near the same place, all for the development of electrical power and energy, and the permanent improvement of navigation on the Saint Lawrence river at and above and below said place; and also of constructing and maintaining a bridge upon or in connection with said works, and of carrying on the manufacture of commodities with the said power." Section 2 defines the general corporate powers. Section 3 provides that the corporation shall have the right to construct, maintain and use "all such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power, and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the Saint Lawrence river, near Long Sault island or Barnhart's island, and

upon the said islands, or either of them, and between said islands, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electric power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized, and to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the Saint Lawrence river, with the approaches thereto, for the use of foot passengers, animals and vehicles, and to charge reasonable rates of toll for passage thereon; the said rights being granted upon the express condition that said corporation shall make just compensation to all persons injured by the exercise of the rights and privileges heretofore granted, and that said corporation shall also erect and construct a lock or locks as may be required by the United States of America, and shall provide electrical power or energy for the maintenance, operation and use of said lock or locks, free of charge, and shall in all other respects perform, fulfill and abide by all and singular the conditions and provisions of this act, and also of any act of the Congress of the United States relating thereto, and also upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but, on the contrary, that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the
126 natural flow of water in said river as affecting its navigability from time to time." Section 4 directs the commissioners of the land office to grant unto the corporation, upon its application and after the payment by it to the state of $10,000 and after the United States shall authorize the construction of dams, locks and canals as provided, "the title and interest of the people of the state in and to lands under the waters of the Saint Lawrence river to be covered or occupied by said works and locks and power-houses," imposes a forfeiture and reverter thereof unless the lands are actually used by said corporation for the authorized works, within fifteen years from the grant, and directs that "in consideration of the conveyance so made under the authority of this act, as well as for the rights and privileges hereby granted, the said corporation in addition to the payment aforesaid [of $10,000] shall pay into the treasury of the state for the year nineteen hundred and ten the fixed sum of fifteen thousand dollars, and for the year nineteen hundred and eleven

the fixed sum of twenty thousand dollars. For each year after nineteen hundred and eleven, the said corporation shall" make payments based upon the average amount of electrical horse power generated during such year under the authority of the act, "and if for any year after nineteen hundred and eleven the amount payable at rates aforesaid is less than twenty-five thousand dollars, then said corporation shall pay for such year the sum of twenty-five thousand dollars instead of the amount that would be payable at the rates aforesaid." The payment of each year shall be payable on or before February 1 in the following year, and "in case the said corporation shall fail to pay any amount due hereunder within sixty days after the same is payable as herein provided, in addition to any other remedies which may exist by law, the rights and privileges hereby granted may be forfeited." The payments are based upon the assumption that the corporation under the authority of the act, "subject only to the lawful control of the United States government, may use for the purposes herein specified, at the places herein mentioned, all of the waters of the Saint Lawrence river south of the international boundary line, but in case said corporation shall at any time be compelled to make any payment to the Dominion of Canada or the Province of Ontario for the use by said corporation of any portion of said water to generate power as authorized by this act, said corporation shall be entitled to an equitable readjustment of the rate of compensation to be paid to the state for that portion of the said water for the use of which said corporation shall be compelled to make payment to said dominion or province," and there follows a provision for making the readjustment by arbitration. In the following sections it is provided that any portion of the assets and the franchises and rights appurtenant thereto may be sold
127 upon a prescribed condition "but subject always to all the conditions and provisions of this act;" that the existence of said corporation shall be perpetual; that the corporation "shall begin the work of construction of its dam pursuant hereto within one year after the Congress of the United States shall authorize the construction of dams, locks and canals hereby authorized, and in case such construction shall not be so begun the grants, rights and privileges hereby granted may be forfeited," and that the act shall take immediate effect.

The corporation has complied with and expended in good faith a large sum of money under the provisions of the act. The United States have not authorized the construction of the dam and other structures contemplated by the act. The corporation has not generated any electrical horse power. Under the terms of the act, therefore, $25,000 became payable by the corporation into the treasury of the state on or before February 1, 1913. The treasurer of the state refused on January 27, 1913, to receive such payment upon the ground that the act was unconstitutional and void. This proceeding, instituted February 10, 1913, is to compel him to receive it. Other legislative enactments are, however, to be considered.

While the appeal to the Appellate Division was pending, the legislature passed two acts relating to the present controversy. One of

them, passed May 8, 1913, is chapter 452 of the laws of that year. It is entitled "An act to repeal chapter three hundred and fifty-five of the laws of nineteen hundred and seven, entitled [then follows its title as already given], providing for the repayment to such company of certain moneys paid by it under such act and making an appropriation therefor." The first section enacts that the chapter 355, describing it by its title, "is hereby repealed upon the following grounds." Four grounds are then stated. Section 2 directs the state comptroller to repay, from the moneys appropriated by the act, to the corporation all sums paid by it into the state treasury with interest, and enacts: "Such company is continued in existence for the purposes only of receiving and giving proper vouchers for said moneys, making proper distribution or application thereof among its members or other persons entitled thereto, and the winding up of its affairs." Section 3 appropriates a sum for the purpose expressed in section 2. Section 4 is: "The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal," and section 5 gives the act immediate effect.

The other of them, passed May 8, 1913, is chapter 453 of the laws of that year. It is entitled "An act to confer jurisdiction upon the board of claims to hear, audit and determine the alleged
128 claims, if any, which may be presented by the Long Sault Development Company against the state of New York by reason of the repeal by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and seven." Section 1 confers upon the board of claims jurisdiction to hear and determine the alleged claims, if any, which may be presented by the company against the state by reason of the said repeal, creates the consent of the state thereto, provided that such alleged claims, if any, shall be filed with the board of claims within six months after the act takes effect, and provides that no award shall be made except upon such legal evidence as would establish a liability against an individual or corporation in a court of law or equity. Section 2 is: "Nothing herein contained shall be regarded as conceding the validity of any of such alleged claims upon the part of the state growing out of the enactment" of the chapter 355 and by the repeal of it, nor as waiving, on behalf of the state, any defense thereto. The act is given by section 3 immediate effect.

Additional facts will be hereinafter stated.

It is the legal duty of the state treasurer to receive all moneys paid into the treasury of the state. (State Finance Law, Laws 1909, ch. 58 [Cons. L. ch. 56], sec. 3.) If the terms of the chapter 355 had upon its passage validity which chapter 452 of the Laws of 1913 has not withdrawn or destroyed, the $25,000 were, when refused by the state treasurer, payable into the state treasury, and he was obligated and may be directed by the writ of mandamus to receive them. (People ex rel. Cayuga Nation of Indians v. Commissioners of Land Office, 207 N. Y. 42.) A fundamental question, therefore, is, was chapter 355 lawful and valid, because if it was void the mandamus was rightfully withheld (People ex rel. Sherwood v.

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State Board of Canvassers, 129 N. Y. 360), and if it was valid a further question is, did the act of 1913, if valid, annul the rights and privileges of the corporation or the obligation of the corporation to pay the $25,000 that they might not be subject to forfeiture and extinction? It may well be here stated that the rights of neither riparian owners nor the United States are involved under this appeal.

I consider first the assertions that chapter 355 is invalid and inoperative because it provides (*a*) for the alienation by the state of title to lands under the water of the St. Lawrence river, and (*b*) for the abdication by the legislature of its sovereign control over navigation for the benefit of the private corporation. I take judicial notice that the St. Lawrence river is navigable and a boundary between the United States and the Dominion of Canada. The title of the state to that part of it southerly of the boundary line between the two countries is, properly, not questioned by any party. The riparian owners did not have title to it, because the rule of the com-
129 mon law of this state (enlarging or extending that of England) that the title to the bed of navigable rivers, not tidal, is in the owners of the adjacent banks, is not applied to rivers constituting the boundary lines between nations. (Fulton L., H. & P. Co. v. State of New York, 200 N. Y. 400; Canal Appraisers v. People, 17 Wend. 570, 598, 599; Matter of Comrs. State Res. at Niagara, 37 Hun. 537, 547.) Nor has it been applied, for certain exceptional reasons to portions of the Hudson and Mohawk rivers. (Fulton L., H. & P. Co. v. State of New York, 200 N. Y. 400.) From the formation of the Federal government, it has been held, without interruption, that the title to the lands under all inland waters, navigable in fact, was not in the United States, but in either the state or the grantees, as the law of the state declared. (United States v. Chandler-Dunbar W. P. Co., 229 U. S. 53.) The title of the state to the bed of the St. Lawrence is, however, not proprietary and absolute. It is vested in the state as the representative of the people. A navigable river is, at common law, a public highway which had existence when the political community and government within whose jurisdiction it is arose. Inasmuch as the title to the waters and the land under them cannot well, according to the common-law concept of title, as ownership in a determinate body, be vested in all the people of a state, the wisdom of the law has placed the title, originally, in the state, with the right of the state to grant certain interests therein, subject, however, under either ownership to certain rights common to all, chief of which are those of navigation and fishing. Such public rights are not affected by the location of the title, whether in the state or in private owners. In either case the ownership is representative of all the people, whose interests are property interests or rights and not mere privileges or immunities of citizenship.

The doctrine that the title to the navigable waters of the state is held thus representatively for the use and benefit of the people inheres in general principles of the common law of England which long antedate our state or federal constitutions, and had their origin in rights conceded to the crown centuries before the revolution. The

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crown, by virtue of the title thereto deemed to be vested in it, could grant the soil of tidal waters, which alone English common law held navigable, so that it should become private property—the jus privatum—but the grant was subject to the paramount right of public use—the jus publicum—which the crown could neither destroy nor abridge. But while the crown could make no grant in derogation of the common rights, Parliament might do so. Under
the colonial charters all rights belonging to the English
130 government were conferred upon its representatives in this
country. The title of the crown, both the jus privatum and the jus publicum, with rights of regulation and control in Parliament in the interest of the people, came to the colonies and afterwards passed to the several states. The state, through the Federal Constitution, delegated to the Federal Congress the power to regulate commerce among the several states and with foreign nations and thereby subjected itself to a right, superior to its own, to control the waters and soil of its navigable waters so far as may be necessary for the regulation of interstate or foreign commerce. Until Congress acts on the subject, the power of the state is plenary. The nature and quality of the title of the state when the chapter 355 was passed was as above delineated. We are to determine whether the effects of the chapter were invalid as to such title.

A critical study of the part of chapter 355 relating to the granting of the soil to and the use of the waters by the corporation epitomizes its cardinal effects as follows: The legislature granted to it the right (dependent upon the authorization of Congress) to construct and use upon the bed of a part of the river, specified but of unstated extent, the structures, including dams and canals, proper or useful for the development of water power and of electrical power and energy therefrom and in connection therewith a toll bridge or bridges, and to take and use the waters of the river, subject to the lawful control of the United States at and above the location of the structures, and that it "shall in all other respects perform, fulfill and abide by all and singular the conditions and provisions of this act, and also of any act of the Congress of the United States relating thereto, and also upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but, on the contrary, that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time." (Section 3.) After the United States shall authorize the construction of the structures and a prescribed payment is made to the state by the corporation, the state shall, upon its application, convey to it the lands of the river to be occupied by the structures. The corporation shall begin the work of constructing its dam within one year after Congress shall authorize the construction of the dams, locks and canals, failing in which the grants and rights may be forfeited.

The provision for conveying the lands of the river to be
131 occupied by the structures, in and of itself and apart from the authorized use, is not ultra vires of the state or in contra-

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vention of its obligations as the representative owner of them. The common law always yielded to the crown the right to convey the soil of navigable waters, but the grant was subject to the right of public use, which Parliament could, at least, regulate and derogate. It is well established in this country that the legislature of the state may, as the representative of the people, grant the soil of or confer an exclusive privilege in navigable rivers or waters held by it for the people, or authorize a use inconsistent with the public right, or interfere with the rights of navigation, so far as the public is concerned, when acting in the public interest, subject to the paramount control of Congress. (People v. N. Y. & S. I. F. Co., 68 N. Y. 71; Saunders v. N. Y. C. & H. R. R. R. Co., 144 N. Y. 75; Shively v. Bowlby, 152 U. S. 1, 48-50; Barney v. Keokuk, 94 U. S. 324; Langdon v. Mayor, etc., of N. Y. 93 N. Y. 129, 154; People ex rel. H. & M. R. R. Co. v. State Board Tax Commissioners, 203 N. Y. 119, 129.)

The provisions granting to the corporation the right to construct within the river the designated structures and to take and use the waters as specified for the development of water power and of electrical power and energy present important questions. The conservation and application of natural water powers for generating electrical power which can be transmitted through long distances has achieved under modern knowledge and conditions an importance and utility in promoting the public advantage undreamed of when waterways were the chief channels of transportation. The people of the state are the beneficial proprietors of the St. Lawrence river. The usufruct of it belongs to them and cannot be granted or destroyed by the legislature. It does not exist, however, solely in the common right of navigation. Other uses may promote the public welfare and prosperity and make the usufruct more valuable, although they are inconsistent with and a curtailment of free and unimpaired navigation. While it is the duty of the legislature to protect the public interest in navigable waters against infringement, the use of them is not restricted to navigation and its accessories, and the interests of the people may justify other public uses in connection with and to the obstruction and embarrassment and, perhaps, in substitution of it. Although the legislature cannot abolish the agencies and conditions under which the people of the state are a society and accomplish their manifold affairs or divest them of sovereignty over any part of the territory of the state, it possesses completely the legislative power of the people retained under the federal and state constitutions. (People ex rel. Simon v. Bradley, 207 N. Y. 592; Gautier v. Ditmar, 204 N. Y. 20.) In People
132 v. Baltimore & O. R. R. Co. (117 N. Y. 150, 155) we considered the validity of an act authorizing the department of docks of New York city to authorize the possessor of any pier or bulkhead for transportation purposes to erect sheds for the protection of cargo and thus withdrawing from public use what was in legal contemplation a public highway. Judge Gray, writing for the court, said: "The right to exercise the sovereign power of the people was vested in the legislative body; whose acts are supreme,

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when confined within the limits fixed by the Constitution of the state. An eminent dominion over all property in the state is an incident of the sovereign power. * * * If an exercise of this power, as for instance, as in this case, by permitting a use and an appropriation of a public pier to some other or quasi private use in the way proposed by the defendant, affects some existing or natural right of the public to the use of a highway, I cannot find in the organic law of the state, nor can I find upon principle any restriction upon the legislative action, other than that it shall be in the direction of public utility. It seems to me self-evident as a proposition that the sovereign power, subject to the restrictions interposed by the fundamental law, may be exercised with respect to the public as well as the private rights of citizens. That seems to follow logically as the necessary understanding of the governed of the scope and design of the political dominion of the state, and it finds reason and support in the principle underlying all forms of government that, for ends of the public utility and good, all other ends should yield." It is not contended that every grant of the government is injurious to the interests of the people or that every grant of a franchise in navigable waters must necessarily be so. The erection of a dam or a bridge therein may be of the highest utility to the people. It may essentially promote the public convenience and aid the public interests, and protect the public property. And if persons are found willing to undertake such a work, receiving in return the profit it may produce, surely it cannot be said, as of course, that such a grant under such circumstances is per se against the interests of the people. Whether the grant of a franchise in navigable waters is or is not on the whole promotive of the public interests is a question of fact and judgment confided to the sober consideration of the legislature which is invested with full discretion, and possesses ample means to decide it. It has an exclusive right to make the grant, and it is to be presumed that it emanated from a high sense of public duty to promote the public welfare, and to establish the public prosperity. The cases in which the legislatures have validly authorized the obstruction of navigable rivers are numerous. Among them are, relating to dams, Willson v. Blackbird Creek Marsh Co. (2 Pet. 245); State ex rel. Wausau St. Ry. Co. v. Bancroft (148 Wis. 124); Parker v. Cutler Milldam Co. (20 Me. 353); State v. Godfrey (24 Me. 232); United States v. Bellingham Bay Boom Co. (176 U. S. 211); Renwick v. Morris (7 Hill, 575); Pound v. Turck (95 U. S. 459); Adams v. Ulmer (91 Me. 47); People v. Rensselaer & S. R. R. Co. (15 Wend. 113, 131); Crittenden v. Wilson (5 Cow. 165); Ensworth v. Commonwealth (52 Pa. St. 320); relating to booms: Mullen v. Log-Driving Co. (90 Me. 555); J. S. Keator Lumber Co. v. St. Croix Boom Corp. (72 Wis. 133 relating to bridges: People ex rel. Murphy v. Kelly (76 N. Y. 475); Miller v. Mayor of N. Y. (109 U. S. 385); Commonwealth v. Breed (4 Pick. 460); Flanagan v. City of Phil. (42 Pa. St. 219); State v. Leighton (83 Me. 419); Hickok v. Hine (23 Ohio St. 523); Comrs. v. Board of Public Works (39 Ohio St. 628); Commonwealth v. Inhabitants of Taunton (7 Allen, 309); Enfield Toll Bridge Co. v.

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H. & N. H. R. R. Co. (17 Conn. 40); Atty-General ex rel. Easton v. N. Y. & Long B. R. Co. (24 N. J. Eq. 49) We make no reference to the large class of cases of valid grants under which areas of navigable waters have been reclaimed or filled in by wharves or similar structures. Interference with navigation is a question of public expediency and advantage, and its determination is for the discretion and judgment of state and federal legislatures and not for the courts, which may not meddle or intervene unless and until the legislature plainly transgresses against the representative character of the technical title vested in it by virtue of its sovereign entity and bestows grants wholly unrelated to the common usufruct. Such was the legislative action reviewed and condemned in Coxe v. State of N. Y. (144 N. Y. 396) and Illinois Central Railroad Co. v. Illinois (146 U. S. 387).

A water power generating electrical power accessible to any considerable section of the state must be deemed advantageous and beneficial to the public. The power which propels the instruments of transportation or imparts motion to the implements and processes of industry is quite as advantageous to commerce and trade as are the instruments and the implements themselves. The profit which may be made or the private capacity of its receiver does not subtract from the public advantage. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. To the legislature the courts must leave the duty of regulating the use of the public waters as the varying interests of commerce, trade and navigation may require.

The chapter 355 intended to preserve the navigation of the St. Lawrence river. Without again quoting, we call attention to the provisions relating to its navigability in the title and in sections 1, 3, 4 and 9. The courts cannot impute to the legislature dishonest or undisclosed intentions or designs contradictory of those expressed.

If the act can be upheld upon any view of public expediency,
134 we must assume such view was the legislative, and not annul it. (Waterloo W. M. Co. v. Shanahan, 128 N. Y. 345; People ex rel. Wood v. Draper, 15 N. Y. 532.) Every intendment is in favor of the validity of a statute and the courts will not enter upon any independent inquiry as to facts outside of the statute itself for the purpose of nullifying it. (Matter of N. Y. El. R. R. Co., 70 N. Y. 327.)

Chapter 355 did in fact preserve the navigability of the river. Unquestionably and concededly, the grant to the corporation was in its entirety conditioned upon the acquisition by the corporation of authority and direction from Congress as to the first and all constructions by it in the river. It could not enter upon or interfere with the river, under the act, until Congress had sanctioned its proposed works by authorizing the construction of the dams, locks and canals. This, of necessity, implies accurate and complete congressional knowledge of the character, location, extent and effects of those authorized structures. Until Congress had acted in the matter, the state had unbounded and unrestricted right to exercise and effectuate its judgments in improving the navigability. (It will be understood, of course, that throughout this opinion I am speaking only of

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the part of the river within the state.) The act did not to any extent impede or shackle the state. It did not give to the corporation or take from the state any control whatsoever of the navigation. The state remained, in so far as the act was concerned, as free and powerful to work its will, in the public interest, in regard to the river and its navigation as it was before the act was passed or would have been in its absence. There was no provision in the act which stayed the hand of the state pending the action of Congress in the matter or which directly or through reasonable implication fettered or withdrew, or turned over to the corporation, to any extent or in any particular the control held by the state, at the passage of the act, of navigation or the waters desired therefor. There was no language in it which would have branded as illegal, immoral or unfair whatever action concerning navigation the state might have taken. The control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention on the part of the legislature to that end. (Sage v. Mayor, etc., of N. Y., 154 N. Y. 61; People v. N. Y. & S. I. F. Co., 68 N. Y. 71.) The act in this regard was, in effect, the grant of such land under the water as the structures approved and authorized by Congress should cover, and of the right to use such surplus water as navigation regulated and controlled by Congress should not require for a water power, the grant, however, to have and take no effect until Congress had acted in the matter. Whenever Congress acted in the matter, it drew
135 and retained unto itself exclusive and paramount control over the navigation and waters of the river for that purpose. Thereafter and thereupon such control was vested exclusively in Congress, by virtue, not of the act, but of the authority delegated by the state through the Federal Constitution. Congress may alter or obliterate whatever the state had placed or caused to be placed in the river in aid or improvement of navigation or other public utility, and, as has been held by the courts of the United States, might remove or change whatever structures it might have authorized the corporation to construct, as the navigation from time to time, in its judgment, required. (Union Bridge Co. v. United States, 204 U. S. 364; Escanaba Company v. Chicago, 107 U. S. 678; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349.) The act did not authorize a grant of the soil or a use of the waters of the river in derogation of the right of the state to control them for the purpose of navigation. It did not, as of course it could not, affect the power of Congress over them.

I consider next the assertion that the authority to grant the lands to be occupied by the structures in the river is in violation of article 7, section 7, of the Constitution of the state. The section provides: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. (Const. 1894.) But the legislature may by general laws provide for the use of not exceeding three per centum of such lands for the con-

struction and maintenance of reservoirs for municipal water supply, for the canals of the state and to regulate the flow of streams." (Amendment of Nov. 4, 1913.) This provision took effect January 1, 1895. The forest preserve was then fixed by law (Laws of 1893, ch. 332, § 100) as follows: "The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of Clinton, except the towns of Altona and Dannemora, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except 1. Lands within the limits of any village or city and 2. Lands, not wild lands, acquired by this state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund." The lands to be granted upon the authorized application of the corporation are in St. Lawrence county. Long Sault island and Barnhart's island, mentioned in section 3 of the act, as already quoted, are and have been for more than fifty years settled as farming communities; the lands on the mainland adjacent to the islands
136 and through the distance of twenty-five miles from the river are (except those within two villages) and have been for more than thirty years used for farming purposes and without forests other than as left by the owners to afford necessary firewood While the language of the statute is clear and definite, it should be applied and enforced reasonably and as contemplated by the legislature. If the state held or should acquire upon the bank of the river at this point a tract of land for prison, hospital, armory, canal or highway purposes, a reasonable and intelligent apprehension of the intent and purpose of the act would not permit the conclusion that it was included within the forest preserve. The application of the act to it as to the lands involved in this appeal produce effects which are unreasonable and purposeless. It is a familiar rule that it is not the province of the courts to supervise or revise legislation, and a law plain and certain in its meaning declares itself and is insusceptible of interpretation. Uncertainty does not spring alone, however, from uncertainty of expression. It is always presumed, in regard to a statute, that no unjust or unreasonable result was intended by the legislature. Hence, if viewing a statute from the standpoint of the literal sense of its language, it works such a result, an obscurity of meaning exists, calling for judicial construction. The courts must in that event look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby determine the true legislative intention and purpose; and if such purpose is reasonably within the scope of the language used, it must be taken to be a part of the statutue the same as if it were plainly expressed. (Matter of Meyer, 209 N. Y. 386.)

In ascertaining the intention of the legislature, we may take judicial notice of the relevant facts of current history which are generally known within the limits of our jurisdiction. (People v. Snyder, 41 N. Y. 397; Howard v. Moot, 64 N. Y. 262; Trustees Ex. F. Ben. Fund, v. Roome, 93 N. Y. 313.) Prior to 1872 the state made facile and extravagant disposition of the forest lands in the

Adirondack territory or wilderness. In that year a policy looking to the preservation of those forests and the vesting in the state the title to a large part of those lands was conceived. Through the succeeding dozen years official commissions and legislative committees investigated and reported in the matter. Those reports demonstrate that the profound and fundamental motive and purpose in the legislative creation of the forest preserve was the preservation and restoration of the forests of the territory located within the mountainous and semi-mountainous region in order that the sources, in large measure, of the waters of the Hudson, the Mohawk and Black rivers might not be extinguished. The protection of those rivers was the inducement and justification of forest ownership in that region by the state. In 1883 the legislature passed two
137 acts (Laws of 1883, chapters 13 and 499) as the first legislative results of the policy inaugurated in 1872, but it was not until 1885 that the forest preserve was created (Laws of 1885, ch. 283) in substantially the same terms as it was continued by the act of 1893 (Laws of 1893, ch. 332). This legislative action was based upon the reports and recommended bills of the Sargent commission transmitted by the comptroller to the legislature January 23, 1885. (3 Lincoln's Const. Hist. of New York, pp. 391-454.) Appended to the report was a detailed statement of wild or forest, cleared and improved lands in the Adirondack territory, which did not mention any land in any of the towns of St. Lawrence county adjacent to the river. The lands within that county under or within the general vicinity of the St. Lawrence river are not part of the watershed supplying the Hudson, Mohawk or Black rivers. Through scores of years prior to the statute the state had held the title to the soil of the river for uses wholly unrelated to those inducing the creation of the forest preserve. It was widely detached from any part of the mountainous or semi-mountainous or forest lands, and the intervening lands were agricultural in nature and in fact. We conclude, for the reasons stated, that the lands under the river at the locality designated in chapter 355 are not a part of the forest preserve as fixed by law when the constitutional provision was adopted.

I turn now to the assertion that chapter 355 violated section 18 of article 3 of the State Constitution. The section contains the provision: "The legislaure shall not pass a private or local bill in any of the following cases: * * * Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." The chapter is a private act. (Economic P. & C. Co. v. City of Buffalo, 195 N. Y. 286.) The argument of the attorney-general is that the effect of the act was, through the operation of physical laws, although not through the language of the act, the granting of the exclusive franchise of controlling for the purpose of electrical power and energy the waters of the river at a point which is not fixed with precision; that by no possibility either before or after a grant of lands under water to the company, could the state, without violation of the act, grant to others the right to use for any purpose whatever the waters around those islands

or for miles up and down the river. The principle underlying the argument would make the constitutional provision invalidate every franchise for the construction of a dam in the waters of the state. Every dam of river waters makes impossible the useful construction of another within a distance either above or below it and the utilization through another of the water for power pur-
138 poses in that part of the river. The argument is fully answered by the decisions of this court. In Matter of Application of Union Ferry Co. of Brooklyn (98 N. Y. 139, 153) the company sought to condemn under a permissive statute a privately owned pier. (Laws of 1882, chap. 259.) The owners claimed the protection of the constitutional provision under consideration. Judge Rapallo writing for the unanimous court said: "But it is contended that this designation of the particular piece of property to be condemned for the purposes of the ferry renders the grant of the privilege or authority exclusive, inasmuch as no one but the grantee of the power can take the same property. That, however, is not, in our judgment, the nature of the exclusiveness contemplated by the Constitution. The exclusiveness prohibited is one which is created by the terms of the grant, not that which results from the nature of the property or right granted. Where, from the nature of the case, it is impossible that the right or power should be possessed or employed by more than one party, and it is important to the public interest that it should exist and be exercised by some one, the state must necessarily have authority to select the grantee. In such a case the exclusiveness is not produced by the grant, but results from the nature of the thing granted, and to this extent every grant to a corporation or an individual, of the right to acquire real estate, is exclusive. Where a toll bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive. So of all lands acquired by a railroad company for depots, car yards, etc., their right to enjoy those lands is exclusive. The right of the owner of upland to fill out into waters of the state in front of his land is exclusive in respect to the particular property involved, though a similar right may be conferred upon every person owning lands similarly situated. * * * We think that in all these cases the exclusion of others from the enjoyment of rights or privileges similar to those bestowed upon the particular grantee must, in order to come within the constitutional prohibition, result from the provisions of the grant and not from the inherent nature of the right granted." (See, also, Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 186; Bohmer v. Haffen, 161 N. Y. 390.) Whether the chief purpose of the chapter 355 was to improve navigation or to supply to a section of the state electrical power is immaterial here as either result is of service to the public.

The next inquiry is, did the chapter 355 violate article 3, section 16, of the State Constitution. The section is: "No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." As already stated, the chapter is a private act. In the recent case of Eco-
139 nomic P. & C. Co. v. City of Buffalo (195 N. Y. 286) Judge Chase carefully and exhaustively stated the purpose and scope

of the section. Our full duty will be done in applying to the act the enunciations of Judge Chase. The act dealt with the single subject, namely, the creation of the corporation, the Long Sault Development Company. In case the name of the corporation, as stated in the title of the act, had indicated or suggested with a reasonable and fair degree of clearness and certainty the powers and objects of the corporation, the mere title "An Act to incorporate the Long Sault Development Company" would have been an adequate and valid expression of the subject. The act, however, gave an ampler and more informing expression of the subject of the act by stating in a general way objects of the corporation as follows: "* * * to construct and maintain dams, canals, power-houses and locks at or near Long Sault island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities." The title fairly and reasonably expressed the subject of the act. The body of the act did not contain objects or rights of the corporation which were foreign to or incongruous with the title of the act or the name of the corporation. It does not startle or surprise the ordinary mind familiar with titles to read in the body of the act that the corporation might ask for and receive the grant of the soil to be occupied by its authorized works, nor that an object was "to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the St. Lawrence river, with the approaches thereto, * * * and to charge reasonable rates of toll for passage thereon." The construction of a bridge at the designated locality is as suggestive of tolls as that of a railroad is of fares. (Parker v. Elmira, C. & N. R. R. Co., 165 N. Y. 274. The part of the title relating to a bridge would suggest to an interested person that he should consult the body of the act for details and exactness in the matter. The purpose of the title is to call attention to the subject of the act, so that a person reading it may know what matter is being legislated upon, and it is sufficient when broad enough to accomplish that purpose. I find in the body of the act no subject not expressed in the title, and no object of the corporation inconsonant with those stated in the title or the name of the corporation.

I conclude that the chapter 355 was constitutional and valid.

It is argued by the counsel for the corporation that chapter 452 of the Laws of 1913—the repealing act—is unconstitutional and void as a whole for the reasons that (*a*) the provisions for the repayment of the moneys paid to the state were unconstitutional for several reasons, and an inducing cause of the legislation, and (*b*) this court cannot say that the legislature would have passed the act if the unconstitutionality of the Long Sault Development Company's charter had not by its terms been expressly assumed.

Section 1 of article 8 of the Constitution provides: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in

the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." Under this section the legislature had the undoubted right to extinguish by a repeal of the chapter 355 the existence of the corporation. (People v. O'Brien, 111 N. Y. 1.) A repealing clause in a statute may be valid, although every other clause is unconstitutional, if such is manifestly the legislative intent. (1 Lewis' Sutherland Stat. Const. [2nd ed.] § 245; People ex rel. Angerstein v. Kenney, 96 N. Y. 294; Campan v. City of Detroit, 14 Mich. 275; State ex rel. Law v. Blend, 121 Ind. 514.)

The arguments of counsel in relation to, as well as the contents of, chapters 452 and 453 of the Laws of 1913 have been studied and considered by me; I do not deem it necessary or useful to discuss them here for the reason that my clear and certain conviction, based upon the language itself of the two chapters, is that the legislature in intention and in language absolutely repealed chapter 355 of the Laws of 1907, saving and preserving, however, the existence of the corporation for the purpose, at least, of winding up its affairs. That conclusion having been reached, it is not necessary that we should, and it is prudent that we should not, express an opinion as to either the validity or effects of the other provisions of the statutes, which may clearly be disregarded without destroying the integrity of the repealing provisions.

The validity of the chapter 355 being established, the special franchises and rights granted by it, in so far as they were or had become property (and in this regard we must accept the allegations of the petition, which are not disputed), were held under the guaranties which protect other property and were not destroyed or confiscated through the appeal. (People v. O'Brien, 111 N. Y. 1; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 673; Lothrop v. Stedman, 42 Conn. 583.)

The Appellate Division decided that the acts of 1913 constitute an attempted condemnation of the special franchise granted the corporation. I cannot concur in that view. Eminent domain is inherent in sovereignty, and the right to exercise it is legislative. The courts cannot instigate or authorize it. It forcibly takes from the citizen his property, and a statute must grant it in express
141 terms, or by necessary implication, and not in vague or doubtful language; and this rule must be applied, although the legislature, as it may, appropriates property directly, by an act, instead of delegating the right. An alleged authority will be strictly construed against the claimant. (Erie R. R. Co. v. Steward, 170 N. Y. 172; Matter of Poughkeepsie Bridge Co., 108 N. Y., 483.) The statutes in question are far short of meeting these requirements. They contain no words by which the property is or is to be appropriated, or require no act or effect which can be accomplished only through eminent domain. The claims to be adjudicated by the Board of Claims are those alleged, if any, by reason of the repeal of the chapter 355. The repealing act does not recognize any property right in the corporation, or provide for any appropriation of prop-

erty. The "liability" of the state, if any, by reason of the repeal, is not to be adjudicated unless the alleged claims are filed within six months after the act (chapter 453) takes effect, and is to be determined only upon such legal evidence as would establish a liability "against an individual or corporation in a court of law or equity." The acts do not contain the clear and express language by which eminent domain must be authorized.

The existence of the corporation was continued for the purpose of "winding up its affairs." (Laws of 1913, ch. 452, § 2.) It is in existence for the purpose of conserving, preserving and using its property or its avails, for the payment of its liabilities and the distribution of a surplus among its stockholders. The right to preserve property is a property right equally with the property protected. The corporation, after the repeal of the chapter 355, had the right to preserve from a ground for forfeiture and extinguishment the franchises and rights which it owned, by paying into the treasury of the state the $25,000 requisite for that purpose. It owned them subject to the restrictions and conditions imposed by the chapter, which were neither annulled nor waived by the repealing act. It follows that it was the duty of the state treasurer to receive them.

The orders of the Special Term and Appellate Division should be reversed and the application for a peremptory writ of mandamus should be granted, with costs in all the courts.

Werner, Hiscock, Chase, Cuddeback and Miller, JJ., concur with Willard Bartlett, Ch. J.; Collin, J., reads dissenting opinion.

Orders affirmed.

142 STATE OF NEW YORK,
Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Long Sault Development Co. v. Kennedy decided by the Court of Appeals on the 9th day of June, 1914, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 26th day of June, 1914.

[Seal State of New York, Court of Appeals.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Long Sault Development Co. v. Kennedy decided by the said Court of Appeals on the 9th day of June, 1914, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the — day of June in the year of one thousand, nine hundred and fourteen.

WILLARD BARTLETT,
As Chief Judge of the Court of Appeals of the State of New York.

143 [Endorsed:] In the Matter of The Application of the Long Sault Development Company for a writ of Mandamus against John J. Kennedy, as Treasurer of the State of New York. Opinion of the Court of Appeals certified by the reporter of court.

Endorsed on cover: File No. 24,414. New York Supreme Court. Term No. 670. Long Sault Development Company, plaintiff in error, vs. Homer D. Call (as successor of John J. Kennedy) as Treasurer of the State of New York. Filed October 26th, 1914. File No. 24,414.

FILED
MAR 13 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. [redacted] 49

IN THE MATTER OF THE APPLICATION

OF THE

LONG SAULT DEVELOPMENT COMPANY,
Plaintiff in Error,

against

HOMER D. CALL (as Successor of John J. Kennedy), as Treasurer of the State of New York,
Defendant in Error.

BRIEF OF PLAINTIFF-IN-ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1915.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY, Plaintiff-in-error, vs. HOMER D. CALL (as successor of John J. Kennedy) as Treasurer of the State of New York, Defendant-in-error.	No. 271. In Error to the Supreme Court of the State of New York.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This cause is brought here upon a writ of error to the Supreme Court of the State of New York, to review a final judgment on an amended remittitur from the Court of Appeals of that State, denying an application for a writ of mandamus to compel the State Treasurer to accept monies due to the State from the plaintiff in error. The application was denied upon the grounds that Chapter 355 of the Laws of 1907 of the State of New York which created the Long Sault Development Company, and under which it claimed to exist, conferred no property rights and that the repeal of the act terminated its right to exist as a corporation.

The Long Sault Development Company was incorporated by a special act of the Legislature of the State of New York, entitled (Record, page 12):

> "An Act to incorporate Long Sault Development Company, and to authorize said Company to construct

and maintain dams, canals, power houses and locks at or near Long Sault Island for the purpose of improving the navigation of the St. Lawrence River, and developing power from the waters thereof, and to construct and maintain a bridge and carry on the manufacture of commodities."

The act was passed by a two-thirds vote and became a law with the approval of Governor Hughes May 23d, 1907 (R., page 12). The act is printed in full at page 22 of the record.

By Section 1 of the Act the Company is constituted a body corporate for the purpose of

> "erecting, constructing, maintaining, operating and using, in connection with the St. Lawrence River, a dam or dams, a canal or canals, a reservoir or reservoirs, and a power house or power houses and works appurtenant thereto, at or near Long Sault island, in the County of St. Lawrence, and of erecting a lock or locks, and works appurtenant thereto, at or near the same place, all for the development of electrical power and energy, and the permanent improvement of navigation on the St. Lawrence River at and above and below said place; and also of constructing and maintaining a bridge upon or in connection with said works, and of carrying on the manufacture of commodities with the said power."

Section 2 of the Act confers upon the Company all corporate powers usually possessed by corporations organized under the general laws.

Section 3 contains a grant of special powers in the following terms (R., page 23):

> "SECTION 3. Said corporation shall have the right to erect, construct, maintain, operate and use all such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power, and of electrical power and energy

therefrom, at such point or points upon or adjacent to the south shore of the Saint Lawrence river, near Long Sault islands or Barnhart's island, and upon the said islands, or either of them, and between said islands, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized, and to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the Saint Lawrence River, with the approaches thereto, for the use of foot passengers, animals and vehicles, and to charge reasonable rates of toll for passage thereon; the said rights being granted upon the express condition that said corporation shall make just compensation to all persons injured by the exercise of the rights and privileges heretofore granted, and that said corporation shall also erect and construct a lock or locks, as may be required by the United States of America, and shall provide electrical power or energy for the maintenance, operation and use of said lock or locks, free of charge, and shall in all other respects perform, fulfill and abide by all and singular the conditions and provisions of this act, and also of any act of the congress of the United States relating thereto, and

> also upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but on the contrary, that such navigation shall be preserved in as good condition as, if not better than the same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time."

Section 4 of the Act provides that after the United States shall have authorized the construction of the dams, locks and canals authorized by Section 3 and after the payment to the State by the Company of the sum of $10,000, the New York Commissioners of the Land Office,

> "shall, upon application of said corporation, grant unto it the title and interest of the people of the state in and to lands under the waters of the Saint Lawrence River to be covered or occupied by said works and locks and power-houses * * * ."

Provision is then made for the forfeiture of title in case the lands so granted are not actually used for the purposes mentioned within fifteen years from the conveyance thereof by the commissioners of the land office. The section then proceeds as follows:

> "* * * and in consideration of the conveyance so made under the authority of this act, as well as for the rights and privileges hereby granted, the said said corporation, in addition to the payment aforesaid, shall pay into the treasury of the state for the year nineteen hundred and ten the fixed sum of fifteen thousand dollars, and for the year nineteen hundred and eleven the fixed sum of twenty thousand dollars. For each year after nineteen hundred and eleven the said corporation shall pay at the following rates upon the average amount of electrical horse power generated during such year under the authority of this act that is to say: Upon all amounts up to twenty-five thou-

sand electrical horse power, at the rate of seventy-five cents per horse power;

"Upon all amounts in excess of twenty-five thousand electrical horse power and up to one hundred thousand electrical horse power, at the rate of fifty cents per horse power; upon all amounts in excess of one hundred thousand electrical horse power, at the rate of twenty-five cents per horse power. In case said corporation shall generate or develop water power as mechanical power, without transmuting the same into electrical power, then for so much of said water power as shall be so generated or developed, payment shall be made at the above mentioned rates per mechanical horse power."

Provision is then made for ascertaining and keeping a record of the horse power generated in each year, and it is further provided:

"* * * if for any year after nineteen hundred and eleven the amount payable at rates aforesaid is less than twenty-five thousand dollars, then said corporation shall pay for such year the sum of twenty-five thousand dollars instead of the amount that would be payable at the rates aforesaid. Said amounts for each year shall be payable on or before the first day of February in the following year, and within ten days before the same shall become payable the said corporation shall deliver to the state engineer and to the state treasurer a verified statement showing the average amount of electrical horse power generated, and the average amount of mechanical horse power generated and not transmuted into electrical horse power, by said corporation under the authority hereby granted, during the year ending on the thirty-first day of December next preceding the date of making such statement.

"* * * * In case the said corporation shall fail to pay any amount due hereunder within sixty days after the same is payable as herein provided, in addition to any other remedies which may exist by law, the rights and privileges hereby granted may be forfeited."

Section 4 further provides:

> "The payments above specified are based upon the assumption that the said corporation under the authority of this act, subject only to the lawful control of the United States Government, may use for the purposes herein specified, at the places herein mentioned, all of the waters of the Saint Lawrence river south of the international boundary line, but in case said corporation shall at any time be compelled to make any payment to the Dominion of Canada or the Province of Ontario for the use by said corporation of any portion of said water to generate power as authorized by this act, said corporation shall be entitled to an equitable readjustment of the rate of compensation to be paid to the state for that portion of the said water for the use of which said corporation shall be compelled to make payment to said dominion or province."

Section 5 of the Act authorizes the corporation to "sell or convey all or any portion of its property and assets, and the franchises and rights appurtenant thereto * * *."

Section 6 makes the existence of the corporation perpetual.

Section 7 deals with the capitalization of the corporation and the payment of the organization tax.

Section 8 relates to the number and manner of election of directors, and

Section 9 provides:

> "The said corporation shall begin the work of constructing its dam pursuant hereto within one year after the congress of United States shall authorize the construction of dams, locks and canals hereby authorized, and in case such construction shall not be so begun the grants, rights and privileges hereby granted may be forfeited."

The Long Sault Development Company was organized under the foregoing act. It began business thereunder and paid the organization tax and all other taxes due to the State prior to the filing of the petition in this proceeding (R., p. 13). Under the provisions of Section 4 of the act the corporation

paid to the State $15,000 for the year 1910, and $20,000 for the year 1911 (R., p. 13).

With a view to carrying out the purposes for which it was organized the Company employed the most competent engineers available for the character of work contemplated, and caused careful surveys and drawings to be made, and developed and completed a plan for the construction of the works authorized by the act (R., p. 18). In developing such plans the corporation co-operated with the St. Lawrence Development Co., Ltd., a Canadian corporation owning the power development at the foot of Sheik Island near the Mille Roches, Ontario, which corporation had made application to the proper Canadian Government authorities for permission to construct within the Province of Ontario dams, locks, canals and other works to connect in the St. Lawrence River at the international boundary line with the structures of the Long Sault Development Company, so that there should be constructed a single and complete system of water power development of the character authorized by the special act (R., p. 14). The dams, canals and power houses contemplated by such system are shown in the plan Exhibit G (R., p. 30). It is the intention of the Long Sault Development Company to construct the works as shown in conjunction with the Canadian corporation as soon as the necessary authorization is obtained from the Governments of the United States, of the Dominion of Canada, and of the Province of Ontario (R., p. 14).

Navigation will be substantially improved by the proposed works (R., p. 17).

The fall in the river from Lake Ontario to Barnhart's Island, a distance of approximately 100 miles, is 82 feet. Almost half of this fall is at the Long Sault rapids. The river is not navigable at all up-stream at the rapids, and is navigated down stream by only one passenger boat daily during the summer tourist season, June to September inclusive (R., p. 16). All other boats that navigate the river, both up and down-stream at this point, pass through the Cornwall Canal on the Canadian side of the river, in which there are six locks (R., p. 16). The contemplated works of the Long Sault Development Company will eliminate the rapids and will furnish a wide,

safe channel from 30 to 40 feet deep, affording excellent facilities for navigation (R., p. 16). There will be a single lift for vessels passing up and down the river instead of six lifts in the Cornwall Canal as at the present time (R., p. 16). Passenger steamers will by the use of the lock save two hours going up-stream. Other vessels will save four and a half hours in a round trip (R., p. 16). In this connection Chief Judge BARTLETT of the Court of Appeals said (R., pp. 68, 69):

> " As is generally known, the celebrated Long Sault rapids constitute a substantial obstacle to the navigation of the St. Lawrence for commercial purposes, being navigated by only one line of passenger boats during the tourist season. In the petition in this proceeding the effects of the proposed scheme on navigation are summarized as follows:
>
> ' The river, which at Long Sault is now practically unnavigable, will become navigable for all classes of vessels. Both of the contemplated locks will be continuously operated during the navigation season toll free. Reliable and economical power will be made available within the radius of transmission of electricity from the power houses. New industries will thereby be created. There will be increased quantities of products from manufacturing plants utilizing the power, which products must be distributed by boat or rail.' "

For the purpose of carrying out the proposed project the Long Sault Development Company has acquired the eastern end of Long Sault Island and the riparian rights of the westerly end; practically all of Barnhart's Island; 2,000 acres of land on the main shore extending from a point opposite the eastern end of Barnhart's Island up-stream to the Massena Canal; riparian rights along the streams flowing into the St. Lawrence where there was any possibility of riparian damage being caused, and additional lands leading back from the river to a point above any possible future river level (R., p. 17). In all about 4,000 acres of land have been acquired. The corporation has spent more than $750,000 in acquiring the lands and rights, in engineering expenses, the payment of taxes and other obligations to the state, and on other matters preparatory

to construction work, all in reliance upon the grant of powers made to the corporation by said special act of incorporation (R., p. 17). If the corporation is deprived of its franchises and powers granted by said special act, these expenditures will be a total loss with the exception of lands and the riparian rights, which will be worth probably fifty per cent less than the amount paid for them (R., p. 17).

The corporation upon the repeal of its corporate charter made diligent effort to obtain the consent of Congress to the construction of the proposed works, and it will sustain substantially the same damage as above stated if prevented by the act of the State from obtaining such consent (R., p. 18).

On March 29, 1912, the Senate of the State of New York adopted a resolution requesting the Attorney General to transmit to it an opinion as to the constitutionality of the special act incorporating the Long Sault Development Company (R., p. 18).

The Attorney-General submitted an opinion, dated December 30, 1912, pursuant to such resolution, in which he reported (Appendix A) that he considered the act unconstitutional under three sections of the State constitution and further that (R., p. 19) :

> "FOURTH. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the lands in the bed of the St. Lawrence river. The title of the State in these lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation."

On or about January 13, 1913, Governor Sulzer sent to the Legislature a message in which he urged the immediate repeal of the said act on the ground that it was unconstitutional for the reasons stated by the Attorney-General (R., p. 20. See also Appendix B).

On the same day that the message was sent to the Legislature, bills were introduced in the Senate and the Assembly

providing for the repeal of the Act of 1907 for the reasons, as specifically stated in the bills, that the act was unconstitutional and in excess of the powers of the Legislature and also providing for the hearing by the Board of Claims of any claims that the Long Sault Company might have against the State (R., p. 20).

On or about January 21, 1913, the Long Sault Development Company delivered to the State Treasurer and the State Engineer a verified statement as required by Section 4 of the said special act of incorporation, showing that no electrical power had been generated for the year 1912. On the same day the corporation delivered to the State Treasurer a check for $25,000 in payment for the amount due by the corporation to the State for the year 1912 under the terms of said Section 4 (R., p. 14). The State Treasurer returned the check in a letter dated January 22nd, 1913 (Exhibit E, R., p. 14), in which he said (R., p. 29):

> "I am advised by the Attorney-General to return these papers to you for the reason that the statute, under which they assume to be sent, is unconstitutional and void."

Thereupon, the corporation wrote to the State Treasurer under date of January 24th, 1913, as follows (Exhibit F, R., p. 29):

> "PITTSBURGH, PA., January 24th, 1913.
>
> HON. J. J. KENNEDY,
> State Treasurer,
> Albany, N. Y.
>
> DEAR SIR:
>
> I beg to acknowledge receipt of your letter of the 22nd instant with enclosures and note that you return the papers and check referred to for the reason that you are advised by the Attorney General that the statute under which they were sent is unconstitutional and void.
>
> I respectfully call your attention to the fact that several payments have heretofore been made by this

company into the Treasury of the State under the statute in question, and have been accepted and retained by the State without question or suggestion that the Statute is unconstitutional; that no court competent to determine the question has declared the statute unconstitutional, and that no legal proceedings have been instituted by the Attorney General to question the constitutionality of the statute. In behalf of the Long Sault Development Company I emphatically protest against any action on your part or on the part of any other officer or department of the State Government purporting to be based upon the ground that the statute incorporating that Company is or that any of its provisions are, unconstitutional, or for any other reason, void.

Chapter 355 of the Laws of 1907 incorporating the Long Sault Development Company, provides that the Company shall pay into the Treasury of the State certain sums of money which for the year 1912 amount to the sum of $25,000. It is enacted in Section 3 of the Finance Law that 'The Treasurer shall receive all moneys paid into the Treasury of the State.' Concurrently with the delivery of this letter, the Long Sault Development Company, acting under the provisions of said Chapter 355 of the Laws of 1907, will again tender to you, in your capacity as State Treasurer, the sum of $25,000 and will deliver and leave with you a verified statement under the provisions of the statute, concerning electrical horsepower and mechanical horsepower, for the year ending the 31st day of December, 1912.

Yours very truly,

LONG SAULT DEVELOPMENT COMPANY,

ARTHUR V. DAVIS,

President."

On January 27, 1913, the corporation caused the said letter, together with $25,000 in legal tender notes of the United States to be delivered to the State Treasurer at his office in Albany. The State Treasurer again refused to receive the payment from the corporation on the ground that the said special act of incorporation was unconstitutional (R., p. 14).

The answering affidavit of the Deputy State Treasurer admits that the sum of $25,000 was the correct amount due from the corporation for the year 1912 under the provisions of the said act, and that a proper legal tender of that amount was made by the corporation to the State Treasurer (R., p. 36).

The refusal of the State Treasurer to receive the $25,000 due under the terms of the act of incorporation has reduced the value of the right conferred upon the corporation of selling all or any portion of its property and assets, and the franchises and rights appurtenant thereto. It has seriously impaired the credit of the corporation; and unless relief is granted in this proceeding, it will cause a heavy loss in the investments and expenditures made by the corporation upon the faith of the grants contained in said special act (R., p. 18).

Other facts appearing in the Record will be stated as they become material to the argument.

On February 10, 1913, the plaintiff-in-error presented a petition to the Supreme Court of New York praying for a writ of mandamus, peremptory or alternative, directing the Treasurer of the State of New York to receive the payment of $25,000 from the said corporation (R., p. 10). The petition contained, among other averments (R., p. 21), the following:

> "The refusal of the State Treasurer to receive the said $25,000 tendered to him by your petitioner on January 21st and 27th, 1913, under the circumstances above set forth, has therefore created a cloud upon, and, unless the writ herein prayed for shall be granted will irreparably injure and impair, the value of the rights and title conferred by and arising under said Special Act; and not only will the corporate rights, franchise, and power conferred thereby be thus injuriously affected, but also special property rights, privileges and franchises granted thereby will be destroyed, and valid contract rights accruing to your petitioner by reason of the obligations and undertakings assumed under said Special Act by the State of New York for a good and valuable and adequate consideration, will be repudiated to the great and irreparable damage of your petitioner."

The petition was denied by an order entered at Special Term, dated February 15, 1913 (R., p. 11), and an appeal was duly taken to the Appellate Division of the Supreme Court (R., p. 10).

Before a decision was rendered by the Appellate Division, and in fact before final argument was heard on the appeal, the Legislature of New York passed the two bills above referred to, repealing the charter of plaintiff in error and attempting to destroy its property rights. The bills became laws with the approval of Governor Sulzer on May 8, 1913, and are as follows:

CHAP. 452.

AN ACT to repeal chapter three hundred and fifty-five of the laws of nineteen hundred and seven, entitled "An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, powerhouses and locks at or near Long Sault island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities," providing for the repayment to such company of certain moneys paid by it under such act and making an appropriation therefor.

Became a law May 8, 1913, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter three hundred and fifty-five of the laws of nineteen hundred and seven, entitled "An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, powerhouses and locks at or near Long Sault island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of

commodities," is hereby repealed, upon the following grounds :

FIRST. That chapter three hundred and fifty-five of the laws of nineteen hundred and seven is unconstitutional in that it contravenes section eighteen of article three of the state constitution, which provides that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

SECOND. That the said act is unconstitutional in that it contravenes section seven of article seven of the state constitution, which provides that the lands of the state now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private.

THIRD. That the said act violates section sixteen of article three of the state constitution, which provides that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in its title.

FOURTH. That the said act is invalid as being in excess of the powers of the legislature, in that it attempted to provide for the alienation by the state to the Long Sault Development Company of title to the land in the bed of the Saint Lawrence river. The title of the state in those lands is a sovereign right rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

§ 2. The state comptroller is hereby authorized and directed to cause the repayment and return to the Long Sault Development Company of any and all sums paid by such company into the state treasury, under the provisions of section four of chapter three hundred and fifty-five of the laws of nineteen hundred and seven, with interest on said respective sums from the times of their several payments, upon securing proper vouchers

therefor ; such moneys to be paid out by the state treasurer upon the warrant of the comptroller from the moneys hereinafter appropriated therefor. Such company is continued in existence for the purposes only of receiving and giving proper vouchers for said moneys, making proper distribution or application thereof among its members or other persons entitled thereto, and the winding up of its affairs.

§ 3. The sum of thirty-six thousand three hundred and twenty dollars ($36,320), or so much thereof as may be necessary, is hereby appropriated out of moneys in the state treasury not otherwise appropriated for the purpose of making the payments provided for in this act.

§ 4. The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal.

§ 5. This act shall take effect immediately.

CHAP. 453.

AN ACT to confer jurisdiction upon the board of claims to hear, audit and determine the alleged claims, if any, which may be presented by the Long Sault Development Company against the State of New York by reason of the repeal by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and seven.

Became a law May 8, 1913, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Jurisdiction is hereby conferred upon the board of claims to hear, audit and determine the alleged claims, if any, which may be presented by the Long Sault Development Company against the state of New York by reason of the repeal by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and seven, and the state hereby consents in all such claims to have its liability determined,

provided that such alleged claims, if any, shall be filed with the board of claims within six months after this act takes effect. No award shall be made on any such claims against the state except upon such legal evidence as would establish a liability against an individual or corporation in a court of law or equity.

§ 2. Nothing herein contained shall be regarded as conceding the validity of any of such alleged claims upon the part of the state growing out of the enactment by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and seven, and by the repeal of said statute, nor as waiving, on behalf of the state, any defense thereto.

§ 3. This act shall take effect immediately.

The Appellate Division affirmed by a divided court (R., p. 48) the order made at Special Term denying the application for the writ. The prevailing opinion (R., p. 40 *et seq.*) held that the writ of mandamus had been properly applied for, that the four reasons specified by the Attorney General and recited by the Legislature in Chap. 452 of the Laws of 1913, as grounds for declaring the charter of the Company unconstitutional, were without legal foundation and that Chapter 355 of the laws of 1907 was, in its main features at least, constitutional; but also held that the two acts of the Legislature passed after the commencement of the proceeding constituted a repeal of the corporate charter of the company and an appropriation by the State of its property rights under the right of eminent domain. Two out of five judges dissented, holding that the mandamus should issue.

The Court of Appeals by a divided court (R., p. 71) affirmed the order denying the application for the writ, but upon a ground not mentioned below, viz.: that the act of 1907 which had incorporated the plaintiff-in-error and purported to grant it certain property rights was void, for the reason that the grant was of the control of navigation, and as that control was held by the State in its sovereign capacity, it was beyond the power of the Legislature to divest itself of it by voluntary grant (R., p. 70). It was also held that chapter 452 of the laws of 1913 acted as a repeal of the corporate franchise

granted to the plaintiff-in-error by the act of 1907, but the court said (R., p. 69) :

> "* * * the repeal, however, could not operate to confiscate any valid franchise or property right, which the Long Sault Development Company had previously acquired under the act repealed (People v. O'Brien, 111 N. Y., 1). We are, therefore, called upon to consider and determine whether the Legislature possessed the constitutional power to convey away the State control over the navigation of the St. Lawrence River to the extent attempted by the Act of 1907.
>
> "* * * if the abdication of state control over the St. Lawrence as a navigable river at the Long Sault vitiates the entire statute, as I think it does, it follows that neither the Long Sault Development Company or its successors in interest, if it be deemed dissolved, have any rights against the state or its officers to be enforced by mandamus or otherwise " (R., p. 71).

Judge COLLIN wrote a long dissenting opinion upholding the contentions of the plaintiff in error in every material point (Record, p. 71).

Federal questions upon which this court may take jurisdiction were raised by the plaintiff in error in the Court of Appeals and are set forth in extracts from the brief of the plaintiff in error, which by order of the Court of Appeals were incorporated in the amended remittitur, upon which final judgment in this cause was rendered in the Supreme Court (R., p. 52). Briefly, they are that the Act of 1907 conferred upon the Long Sault Company contract rights and that the State, by refusing to recognize such rights and by passing the two repealing acts of 1913, attempted to impair its contract with the Company in violation of Article I., Section 10 of the Federal Constitution; and, further, that the same acts on the part of the State constituted an attempt to deprive the Company of its property without due process of law, in violation of the Fourteenth Amendment.

The plaintiff in error intends to urge that there were errors

in the decision of the Court of Appeals in the following particulars, viz:

1. In that it was decided that Chapter 355 of the Laws of 1907 of the State of New York was unconstitutional and void, and, that it did not constitute a contract between the State of New York and the plaintiff-in-error, or confer upon the plaintiff-in-error property rights and franchises.

2. In that it was decided that the grant of powers to said Long Sault Development Company, provided for in said Chapter 355 of the Laws of 1907, was beyond the constitutional power of the State to make within the principle laid down in *Illinois Central Railroad Company vs. Illinois*, 146 U. S., 387.

3. In that it was decided that said Long Sault Development Company was not entitled to a writ of mandamus requiring the Treasurer of the State of New York to receive from it the sum of $25,000, as a payment due to the State of New York from said corporation for the year 1912 under the provision of said Chapter 355 of the Laws of 1907.

4. In that it was decided that Chapter 452 of the Laws of 1913 of the State of New York did not impair the obligation of the contract between the State of New York and said Long Sault Development Company, within the meaning of Article I., Section 10, Subdivision 1, of the Constitution of the United States.

5. In that it was decided that the act of the Treasurer of the State of New York in refusing to receive the aforesaid sum of $25,000 from the said Long Sault Development Company on the ground that Chapter 355 of the Laws of 1907 was unconstitutional and void, being sustained by the courts of the State of New York, did not deprive the plaintiff-in-error of property without due process of law, within the meaning and prohibition of the Fourteenth Amendment to the Constitution.

6. In that it was decided that the action taken by the legislative and executive branches of the government of the State of New York, based upon the claim that Chapter 355 of the Laws of 1907 was beyond the power of the State to enact and was un-

constitutional and void, being sustained by the courts of said State, did not deprive the said corporation of property without due process of law, within the meaning and prohibition of the Fourteenth Amendment to the Constitution.

7. In that it was decided that the action taken by the legislative and executive departments of the government of the State of New York, being sustained by the courts of said State in the manner in said record appearing, did not constitute an impairment of the obligation of the contract created by Chapter 355 of the Laws of 1907 within the meaning and prohibition of Article I., Section 10, Subdivision 1, of the Constitution of the United States.

8. In that it was decided that Chapter 355 of the Laws of 1907 did not constitute a contract between the State of New York and said Long Sault Development Company which was within the protection of Article 1, Section 10, Subdivision 1, of the Constitution of the United States, and that said corporation had not acquired property rights by virtue of the provisions of said statute which were within the protection of the Fourteenth Amendment of the Constitution, and that by reason of said decision said Long Sault Company was not entitled to the writ of mandamus applied for in said cause ; and in that the said court erred in deciding against the rights, privileges and immunities specially set up as aforesaid by said Long Sault Company under the Constitution of the United States.

If the court finds it proper to consider the point, the plaintiff-in-error will also urge that the Appellate Division erred in holding that Chapter 452 of the Laws of 1913 and Chapter 453 of the Laws of 1913 constituted a valid exercise of the power of eminent domain and were not, therefore, repugnant to Article I, Section 10, Subdivision 1, of the Constitution of the United States, or to Section 1 of the Fourteenth Amendment.

A writ of error to review the errors herein was allowed by Mr. Justice PITNEY on the 5th day of October, 1914.

Summary of Argument.

I. *Jurisdiction of the Court.* Jurisdiction exists under Section 237 of the Judicial Code (R. S., Sec. 709). The repealing acts of 1913 and the refusal of the state authorities to recognize the rights of the plaintiff-in-error under Chapter 355 of the Laws of 1907, are a violation of Article 1, Sec. 10, of the Federal Constitution, because they impair the obligation of the contract between the state and the plaintiff in error, created by the Act of 1907. They also constitute an attempt to deprive the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment. In the amended remittitur of the Court of Appeals, upon which the judgment of the Supreme Court was rendered, there were embodied extracts from the brief of the plaintiff in error used before the Court of Appeals, from which it appears that the Federal questions above mentioned were urged upon the Court and that the decision was against them.

The decision of the Court of Appeals was based exclusively upon the ground that Chapter 355 of the Laws of 1907 was void, because it constituted an attempt to convey to the plaintiff-in-error control of navigation held by the State in its sovereign capacity. As a result of this view the Court gave substantial effect to the repealing statutes of 1913, although it did not pass directly upon their validity. This Court, however, has always reserved to itself the right to determine whether contract rights exist and to consider whether subsequent state legislation has injuriously affected them. Not only the acts of 1913, but also the course of conduct of agents of the State, including the Governor, the Attorney General, the State Treasurer, the Legislature and the Courts, have amounted to the passing of a law impairing the obligation of the contract evidenced by the act of 1907. This Court therefore has jurisdiction, because there is drawn in question the decision of the state court as to the "validity of" the repealing acts of 1913 and of the aforesaid conduct of the agents of the State, being "an authority exercised under" the State, on the ground that they are repugnant to the Constitution, and the decision was in favor of their validity. Jurisdiction also

exists because the plaintiff in error set up in the court below a "title" or "right" under the Constitution, and the effect of the repealing acts of 1913, and of the action of the state officials, including the decision of the Court of Appeals, was to deprive it of property in violation of the Fourteenth Amendment, and the decision was against the title and right claimed.

II. *The grant made by the Act of 1907 was within the power of the State.* The decision of the Court of Appeals was based solely upon the ground that the State did not have power to make the grant, because it amounted to an abdication of its control of navigation. The Act of 1907, however, was passed with the intention, expressed in the title and in the body of the Act, of improving navigation. Repeated provisions protected the state against its impairment, particularly those which provided that the project should be subject to the consent and direction of the Federal Government. The act is readily susceptible of an interpretation to the effect that the grant was to be confined to the use by the plaintiff in error of the surplus waters of the river not needed for the purposes of navigation. What was granted was not essentially different from what has been granted in New York more than a hundred times since 1812, by special legislative acts giving to private individuals and corporations dam privileges in the streams of the State. The validity of such grants has never been questioned, and is sustained on principle in many decisions in the state and federal courts.

The statutes and treaties of the United States, together with the attitude of the executive department of the Federal Government, indicate that the control of navigation of the St. Lawrence River, has been assumed by the United States, practically to the exclusion of the state. This is shown by the provisions of the River and Harbor Bill of 1899 and the Dam Act of 1906, which make specific provision governing the erection of dams and the control of navigation in connection therewith, and by the Webster-Ashburton Treaty of 1842 and the Treaty of Washington of 1871, which require that the Federal Government should take control of navigation at the Long Sault rapids, in order to discharge the obligations assumed by it toward Great Britain. An analysis of the Long Sault Act of 1907 shows that all clauses relating to navigation were inserted in the Act with obvious reference to the requirements of the two acts of Congress above referred to, showing a clear

intention to recognize the fact that any control of navigation which the state might have, was actually held in subjection to the Federal authority. In view of the extent to which the Federal Government had assumed control of the St. Lawrence River, it would require a violent twisting of the plain language of the Act, to deduce by mere implication from its terms an intention on the part of the legislature to transfer to the Long Sault Company control of navigation to an extent not permitted by law.

In legal effect, after Congress had acted, probably little or no control would remain in the State. The control of the Federal Government extends to the entire navigation and every structure which may affect it, and extends from shore to shore. If the Federal authorities should, by establishing harbor lines or otherwise, leave in the State some control over the local aids to navigation, such as piers; and if the grant by the State under the act of 1907 may be deemed to apply to a transfer of the right to erect such piers, it would not be beyond the power of the State Government. The recent policy of the Federal Government has been to take complete control of navigation to the exclusion of the states. A sufficient explanation of the reason for making such a detailed description of what is granted by the act is found in the desire of the State to conform to the requirements of the Federal statutes, and also, as a matter of comity, to remove any possible objection on the part of the State Government which might impede or embarrass Congress in passing a special act dealing with the subject. Until Congress has passed such an act, the State could not suffer any prejudice because, if the interests of navigation required it, the state would be at liberty to do anything necessary for the protection of the public interests.

A significant indication of the intention of the Legislature is contained in the fact that while in Chapter 452 of the Laws of 1913, four legal grounds are stated on which the act of 1907 was claimed to be void, it was not stated that it attempted to transfer control of navigation.

If there is any doubt as to the intent of the legislature or as to the legal effect of the grant, an interpretation should be adopted which will bring the grant within the legal power of the State; and there are overwhelming reasons in the provisions of

the Act itself and in the existing policy of the National Government, which make such an interpretation the only natural one to be adopted.

III. *The act of 1907, on the acceptance of its provisions, became a contract within the protection of the Federal Constitution.* This is assumed and stated by the Appellate Division and the Court of Appeals, upon the authority of *People vs. O'Brien*. It is the legislative and judicial policy of the State of New York to regard corporate franchises as distinct from property or special franchises. A grant like that made by the act of 1907 contitutes under State and Federal authorities a contract. There is nothing in the character of the property rights granted which makes it appropriate that they should be enjoyed only so long as the corporate rights continue; and there are many indications in the provisions of the Act that the legislature intended that the property rights should not be dependent upon the existence of the corporation. For instance, the corporation is authorized to convey its property or any part thereof, and to mortgage it as security for its indebtedness.

IV. *The provisions of the Act of 1907 have been accepted by the Long Sault Company.* Such acceptance has resulted from acts of the Company indicating its intention to accept the Act, including its payment to the State of the large sums of money required to be paid by the Act. The acceptance of these sums by the state authorities, as well as other facts, indicates that they assumed that the Company had accepted the franchise. The State cannot terminate contract obligations by returning the money so paid. Nor can there be a forfeiture for failure of the Company sooner to avail of its rights. The record shows that the Company had, up to the time when the State officials began to take hostile steps against it, made diligent effort to obtain the consent of Congress to the erection of the dam. No claim of *laches* has been made by the State against the Company. In January, 1912, the State accepted the annual amount payable under the Act and in less than a year thereafter began to attack the franchises. The cloud upon the rights of the Company thus created made it impossible for it to petition Congress with any hope of success.

V. *The decision should be reversed.* It cannot be sustained on any ground decided by the State Court. The Court of Appeals based its decision upon the single ground already referred to. All of the judges of the Appellate Division held that

the four grounds of invalidity stated in Chapter 452 of the Laws of 1913 were without foundation. The majority of the court, however, held that the two Acts of 1913 constituted a taking under the right of eminent domain. The decision of the Court of Appeals is necessarily inconsistent with this view, since it is based on the ground that the State was without power to make any grant at all. The Court should not, therefore, assume that the judgment can be sustained under the state law. In order that the Court may deal intelligently with this subject, however, we have deemed it our duty to deal with all of the points raised in the State Court.

VI. *Chapters 452 and 453 of the Laws of 1913 do not constitute a taking under the right of eminent domain.* They do not provide for just compensation as required by the State Constitution; and they violate the Contract Clause and the Fourteenth Amendment of the Federal Constitution. Nothing in either of the Laws of 1913 indicates an intention to condemn the property of the plaintiff in error. The provision for reimbursement to the plaintiff in error of the money paid by it may be explained on the supposition that it was inserted upon moral considerations, on account of the hardship imposed upon the Company by depriving it of its rights, after it had made a considerable expenditure of money. The Board of Claims is a court of limited jurisdiction, and any intention to give it power in a condemnation proceeding should be expressed in unmistakable language. What was referred to them was to hear claims, but the existence of such claims was not admitted. This is inconsistent with the idea of condemnation. To determine the claims, it would be necessary to pass upon all of the constitutional questions involved in this case, and it is not to be presumed that the legislature intended to refer such matters to a court of such limited jurisdiction as the Board of Claims. There is nothing in any of the proceedings which preceded the passage of the two Acts of 1913 to indicate that it was the intention of the State authorities to proceed by condemnation. On the contrary, everything pointed to the idea that the repealing act was passed because the legislature was advised that, as a matter of law, the Act of 1907 vested no property rights in the Company. This appears from the opinion of the Attorney-General, the message of the Governor and the recitals in the

Acts themselves. The two Acts of 1913 were passed after the Company had elected to test in the Supreme Court the question of the constitutionality of its charter. It was not competent for the legislature, under the guise of making compensation, to compel the Company to go into an inferior court and there try the question whether it had any property rights at all.

VII. *The Acts of 19 ? considered as condemnation acts were in violation of the Fede al and State Constitutions in that the taking of the property of the Company was not for a public use.* The objects of the Acts were merely to terminate any rights that the Company had. Whatever public interest might have induced the legislature to pass the Acts, there was no actual or present use to which the State intended to put the property sought to be acquired.

VIII. *The Repealing Acts, so far as they directed the payment of moneys to the Company, were void.* They violated the provision of the State Constitution that neither the credit nor the money of the State should be given in aid of a corporation. Chapter 452 of the Laws of 1913 purported to audit and allow a private claim against the State, and this is in violation of an express provision of the State Constitution. Both of the bills appropriated public money for local and private purposes. The assent of two-thirds of the members of the legislature was necessary for this purpose, and it was not obtained.

IX. *The repealing acts are void because they were passed on the mistaken assumption expressed in Chapter 452 that the Act of 1907 was void.* It cannot be assumed that the legislature would have passed the acts if it had been advised that the charter of the Company was valid.

All other points raised by the Attorney General below were expressly or impliedly disposed of by the Appellate Division or the Court of Appeals in favor of the plaintiff-in-error. We deal with these points in this Brief to show that there was no question of State law decided by the Court of Appeals, on which the judgment can be sustained.

FIRST POINT.

The Supreme Court has appellate jurisdiction to review the questions brought here by this writ of error.

Section 237 of the Judicial Code provides as follows, viz.:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The plaintiff in error claimed that the act of 1907 constituted a contract with the State. It further claimed, (1) that its rights thereunder were impaired by Chapter 452 of the laws of 1913, in violation of Article 1, Section 10, of the Constitution of the United States, and (2) that the passage of the two acts of 1913, the refusal of State officials to recognize the contract rights created by the act of 1907, and official conduct on their part tending to destroy such rights, deprived the plaintiff-in-error of its property "without due process of law," and were, therefore, in violation of the Fourteenth Amendment of the Federal Constitution. The final judgment of the State Court was against both of these claims. It is, therefore, subject to review by the Supreme Court under the provisions of Section 237 of the Judicial Code, first, because

the validity of Chapter 452 of the laws of 1913 and the "authority exercised under" the State were drawn in question on the ground of their unconstitutionality, and, second, because a "title" and "right" was "especially set up" under the act of 1907.

A.

The Federal questions relied on were sufficiently raised in the State Court.

It would have been impossible to assert in the petition praying for the issuance of the writ of mandamus (R., p. 12) the claim that the acts of 1913 impaired the obligation of the contract rights conferred by the act of 1907, since that petition was verified in February, 1913, and Chapters 452 and 453 of the Laws of 1913 were not passed by the legislature until after the prayer of the petition had been denied and the appeal to the Appellate Division had been taken. The order of the lower court was made February 15, 1913, while the acts of 1913 were not approved by the Governor until May 8th, 1913 (R., p. 40). While the Appellate Division held that the grant made by the act of 1907 was within the power of the legislature, it also held that the acts of 1913 amounted to a taking by the right of eminent domain of such rights or property as had been granted to the Long Sault Company by the act of 1907.

It is not strange under these circumstances that there should not have been set up in any formal manner in either of the lower courts the Federal questions which are now presented; nor was it necessary in the notice of appeal from the order of the Appellate Division to the Court of Appeals (fol. 68) to state the grounds on which the appeal was taken (New York Code of Civil Procedure, Section 1300). Thus for the first time in the Court of Appeals did it become necessary to have recorded the fact that the plaintiff-in-error asserted that it was entitled to the protection of Article 1, Section 10, and of the Fourteenth Amendment of the Federal Constitution. That this claim was made is sufficiently shown by the prevailing and dissenting opinions in the Court of Appeals, as well as by the amended remittitur by which that court sent the record down to the Supreme

Court to be given effect and on which the latter court rendered its judgment (R., pp. 61, 62).

The amended remittitur of the Court of Appeals sets out (Record, pp. 52 to 55) extracts from the brief submitted to the Court of Appeals by the plaintiff in error upon the argument before that Court, in which it was asserted that Chapter 355 of the Laws of 1907 constituted a contract between the corporation and the State and that property rights created thereby were protected by the Federal Constitution. It was asserted that the case came within the principle of *People vs. O'Brien*, 111 N. Y., 1, and that the power to repeal Chapter 355 of the Laws of 1907 could only be exercised " in subjection to the provisions of the Federal Constitution." The further point was made that the grant by the Act of 1907 was a completed grant and could not be cancelled " without violating the constitutional provision prohibiting the enactment of State laws impairing the obligations of contracts." Reliance upon Article 1, Section 10, and the Fourteenth Amendment of the Federal Constitution was asserted repeatedly, as will appear from an inspection of the remittitur.

The Court of Appeals decided against all of the claims thus set up. It held that the Act of 1907, in so far as it attempted to make a grant of property rights, was void and that it did not constitute a contract with the State, and that, therefore, the Company did not become vested with property or contract rights which were within the protection of any provision of the Federal Constitution (Record, p. 69).

It is thus clear that rights were asserted under the Federal Constitution and that the decision of the State Court was against the right so claimed.

B.

This court has power to review the order of the State Court because the validity of Section 452 of the Laws of 1913 and of legislative, executive and judicial action by departments of the State government, has been drawn in question on the ground that they were repugnant to the limitations of the Federal Constitution, and the decision was in favor of its validity.

There would be no difficulty in establishing the jurisdiction of this court under Section 237 of the Judicial

Code upon this ground, if it were not for the circumstance that the Court of Appeals has based its decision exclusively upon the invalidity of chapter 355 of the Laws of 1907, from which it might be claimed that its interpretation of a state statute could not be reviewed in this court. Chief Judge BARTLETT, in his opinion, fails to mention the repealing acts of 1913, further than to say (R., p. 69), that while they are effective to repeal the act of 1907, the repeal "could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed." That conclusion brings him to a consideration of the question "whether the legislature possessed the constitutional power to convey away the state control over the navigation of the St. Lawrence river to the extent attempted by the act of 1907." Having reached the conclusion that the legislature did not have this power, it became unnecessary for him further to consider the effect of the two acts of 1913. This court, however, is not deprived of jurisdiction to review the decision of the Court of Appeals as to the validity of the contract, merely because that court reached its conclusion without specifically declaring the acts of 1913 to be valid enactments. Where a state is a party to a contract claimed to have been created by a legislative act this court has always reserved to itself the right to determine whether the contract exists and, whatever the decision below, to consider whether subsequent state legislation has impaired its obligation.

In *Bridge Proprietors vs. Hoboken Company*, 1 Wall., 116, the legislature of the State of New Jersey in 1790, gave to Commissioners the power to contract with persons for the building of a bridge over the Hackensack River. It was further provided that it should not be lawful for any other person to erect another bridge across the river for 99 years. In 1860 the legislature authorized another company to construct a viaduct across the Hackensack River in such a manner as to interfere with the bridge erected under the act of 1790. The State Court construed the statute of 1790 as not conferring the exclusive right claimed to have been granted, and it was argued in this court that in view of that fact the ~~second~~ subsequent statute was not "drawn in question," that the decision of the court was not, within the meaning of the

statute, "in favor of" its "validity," and that there was therefore, no power in the Supreme Court to review the decision of the State Court. Justice MILLER delivering the opinion of this court said (p. 145):

> "The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. *It was then the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid.*"

In *Jefferson Branch Bank vs. Skelly* (1861), 1 Black, 436, the Supreme Court of Ohio had decided that a section of a state banking law was not a contract with the state within the meaning of the contract clause of the Constitution. It was argued that the Supreme Court "should follow or conform to the conclusion of" the highest court of the state in thus construing its statute law.

The court said (page 443):

> "We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that

the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, *whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings by a litigant, to be one*, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion * * *."

In *University vs. People*, 99 U. S., 309, a statute of Illinois passed in 1855 declared that all the property of the Northwestern University should be forever free from taxation. A subsequent statute passed in 1872, conforming the scheme of taxation to the provisions of the new constitution of 1870, limited the exemption of the University to land and other property in immediate use by the institution. The Supreme Court of the state held that the latter statute did not impair the obligation of the contract of exemption constituted by the statute of 1855 and based its decision largely upon the ground that the statute of 1855 was in conflict with the state constitution of 1848. This court, however, held that the case could be reviewed by it, and said (p. 321):

"It is strenuously insisted that these provisions of the Constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the

> fourth section of the amended charter of 1855, because that section was in excess of the authority conferred by the Constitution of 1848. But this depends on the construction of that contract as affected by the constitution under which it was enacted. If by virtue of that constitution the legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel, which, under a true construction of the Constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the Constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855.
>
> "Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction."

In *Wright vs. Nagle*, 101 U. S., 791 (Error to the Supreme Court of Georgia), the plaintiffs, claiming under an exclusive franchise to maintain a toll bridge, sought to restrain the defendants from constructing another bridge under subsequent authority from the State. The State court denied the plaintiffs' claim on the ground that the County which granted his franchise had no power to grant an exclusive right. A motion was made to dismiss on the ground that no Federal question was involved. The Court denied the motion, saying (p. 793):

> "It is true, the court below disposed of the case by deciding that the State statutes did not authorize the inferior court to grant Miller an exclusive right to main-

tain bridges within the designated limits, and that in so doing it gave a construction to a State statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is when the State court 'has 'been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with State legislation, (*Jefferson Branch Bank v. Skelly*, 1 Black, 436). * * *

"If the court erred in construing the statute, and in holding that there was no contract, then the question is directly presented by the pleadings and the stipulation as to the facts, whether the subsequent action of the commissioners of roads and revenue is, in its legal effect, equivalent to a law of the State impairing the obligation of the contract as it was made. In this way, it seems to us, a Federal question is raised upon the record, which gives us jurisdiction."

In *Atlantic Coast Line R. R. Co. vs. City of Goldsboro*, 232 U. S., 548. A municipal ordinance was alleged to impair the obligation of the contract between the State and a Railroad Company. The State Court held that by the Constitution of the State the charter of the Railroad Company was subject to alteration or repeal, and that the contract created thereby had not been impaired by the ordinance. This court, however, held (p. 556) that it "must determine for itself the existence or non-existence of the asserted contract and whether its obligation has been impaired."

In *McCullough vs. Virginia*, 172 U. S., 102, a question arose as to a decision of the highest court of the state of Virginia as to the right of the state to pass a state statute authorizing the state to accept certain coupons in payment of taxes. The question came up upon the decision of the state court as to the contract created by the statute. The court said (page 117):

"* * * can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judg-

ment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made."

And further, (page 122),

"True, in its opinion, the Court of Appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the State. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

In *Louisiana Railway and Navigation Company vs. New Orleans*, 235 U. S., 164, the facts were are follows: The city sought to restrain the Louisiana R. and N. Co. from proceeding under a municipal ordinance to construct a railroad. Under a previous ordinance permission had been granted to the Illinois Central Railroad Company to construct a railroad upon the same line. A still later ordinance created a public board to construct, control and operate the entire line of railroad. Subsequently another ordinance granted to the New Orleans and San Francisco R. R. Company a right-of-way over the line, and its validity was attacked in a suit brought by the Mayor in behalf of the city. In this situation, a further ordinance was adopted granting to the Louisiana Railway and Navigation Company a right-of-way over the railroad upon the condition that after the plaintiff in error had operated its equipment over the line of road for thirty days, it should pay to the city $50,000,

and that in case the New Orleans and San Francisco Railroad Company failed to build its line to a certain point, plaintiff in error should build the line and be relieved from the payment of the $50,000, the line when built to be turned over to the city and to be under the control of the Dock Board. Subsequently and after a decision against the New Orleans and San Francisco Railroad Company by the Supreme Court of the State in the suit brought by the Mayor, the city adopted a further ordinance making provision for municipal construction and operation, and repealing all conflicting ordinances. This ordinance, if enforced, would have made it impossible for the plaintiff in error to exercise its rights. It deposited $50,000 required by the ordinance under which it claimed, and thereupon the Mayor, in behalf of the city, commenced a suit to have that ordinance declared void. The state court decided that the ordinance, so far as it purported to grant the privileges in dispute, was void, and it was claimed that no effect had been given to the repealing ordinance.

The court by Justice HUGHES said (page 170):

> "* * * It is * * * well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee * * *. And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court * * *. In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordi-

nance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the City asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right. It must follow that this court has jurisdiction to determine whether that claim is well founded, that is, where there is a contractual obligation which the plaintiff in error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law."

See, also,

New Orleans Waterworks Co. vs. Louisiana Sugar Co., 125 U. S., 18, 38.
Wilmington & W. R. Co. vs. Alsbrook, 146 U. S., 279, 293.
Mobile & Ohio R. R. Co. vs. Tennessee, 153 U. S., 486, 492.
Houston & Texas C. R. Co. vs. Texas, 177 U. S., 66.
Atlantic Coast Line vs. Goldsboro, 232 U. S., 548, 556.
Russell vs. Sebastian, 233 U. S., 195, 202.
Douglas vs. Kentucky, 168 U. S., 488.
Hubert vs. New Orleans, 215 U. S., 170.

The application of the principle of these decisions to this case must clearly result in establishing the jurisdiction of the court. And what is said in some of the decisions makes it suitable to call attention to some of the facts appearing in the record to which the Court of Appeals did not allude.

It was the manifest intention of the State to proceed under the two acts of 1913 and terminate the rights of the Long Sault Company in the manner provided for therein. Although the state authorities consistently asserted that the Act of 1907 was invalid, they were not content to permit its invalidity to be determined in a judicial proceeding; for

while the appeal to the Appellate Division was pending, upon which that question was before the court they procured the passage of the two acts of 1913 and thereafter pressed them upon the attention of the court, as is evident from the effect given to them by the Appellate Division. If it had not been for their passage while the appeal was pending before the Appellate Division, the opinions of that court show that the decision would have been unanimously in favor of upholding the validity of the Act of 1907 (R., pp. 40, 48).

The application for the writ of mandamus was made necessary by the refusal of the State Treasurer to receive the payment due from the corporation to the State. His refusal was based upon advice given him by the Attorney General of the State that the Act of 1907 was void (R., pp. 14, 29). The act of the State Treasurer and the Attorney General was shortly followed, on the urgent recommendation of the Governor, by the passage of chap. 452 of the laws of 1913, declaring the charter of the corporation to be void.

It will hardly be questioned that all of these facts disclose that the Governor, the Attorney General, the State Treasurer and the legislature were engaged in a deliberate attack upon the rights claimed by the Long Sault Company under the Act of 1907, which culminated in the decision against the Company by the judicial branch of the State government. All of these acts tended to impair any contract obligation that might have been created by the Act of 1907, and the decision of the State Court holding that the latter act was void and that the corporation for that reason never acquired any property rights, completed the impairment in a decisive manner; and it is unquestionably subject to review by this court.

In *Carondelet Canal Co. vs. Louisiana*, 233 U. S., 362, (Error to the Supreme Court of the State of Louisiana) the State of Louisiana brought a suit in the State Court against the liquidators of the Canal Company to recover possession of a canal. The Company was created and derived its property rights through two acts of the legislature passed in 1857 and 1858. The acts provided that after the expiration of a certain time the State should be entitled to possession of the property. In 1906 the legislature passed an act authorizing the Board of Control to take over the canal at the expiration of the period. The Com-

pany refused to turn the canal over on the ground that the State had not complied with certain contract obligations under the Act of 1858. The Company urged that the Act authorizing the Board of Control to take possession of the property violated the contract clause of the Constitution of the United States if it were construed to authorize a taking without compensation.

The State moved to dismiss the writ on the ground that no Federal question was presented contending that the Company failed to distinguish between a subsequent act of the legislature impairing the contract and the decision of the court construing it, but the court after applying to the situation the principle established by the above cases said (p. 376) that although the state court "did not consider or give any effect to the act of 1906", the act was

> "* * * treated as an important factor in the State's petition in both the charging part and the prayer. The Board of Control had something else to do besides to wait. It was an agency of invasion and it was by its special command that the Attorney General made demand upon the Company. * * * The provision of the Constitution against the impairment of the obligation of contracts was intended 'to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to have made such enumeration, since it might have been defective.' (2 Story Const., sec. 1386.) The precaution was necessary. The prohibition is directed against the exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form. This case is an illustration. Here is a property sought to be taken from the canal company, and there can be no doubt that the Board of Control, through the affirmative and repealing provisions of the act of 1906, was to be the instrument and moving agency. The motion to dismiss must, therefore, be denied, and we are brought to the merits of the controversy—Did the acts of 1857 and 1858 constitute a contract?" (pp. 376–378).

The Court in the *Carondelet* case does not base its decision that it had jurisdiction on any particular clause of Section 237 of the Judicial Code. It does say, however, that Section 10 of Article 1 was intended to protect contracts against impairment by the "exertions of sovereignty * * * whether boldly declared in an explicit law or disguised in an ambiguous form." In other words, that a "law impairing the obligation of contracts" which is prohibited by Article 1, Section 10, would include any effective measure taken by any department of a state government which would have the result of impairing the obligation of a contract. Unless such interpretation is placed upon the contract clause of the Constitution, it would fail in the accomplishment of its obvious purpose; and if we are right in this, then it explains the words contained in the provision of the Judicial Code which vests in this court jurisdiction to review a judgment of the highest court of a state, where "is drawn in question * * * an authority exercised under any state," on the ground of their being repugnant to the Constitution.

The acts of the State Treasurer and the Attorney General before the passage of the repealing act of 1913, and thereafter the concerted action of the Attorney General, the Governor and the Legislature, followed by the decision of the Appellate Division and the Court of Appeals, all had a cumulative effect tending to impair the value of the rights and franchises vested by the act of 1907 in the plaintiff in error. At the commencement of the mandamus proceedings the only act which had been committed by the state authorities was the refusal by the State Treasurer, on the advice of the Attorney General to accept from the Long Sault Company, the amount which it was obliged, under the terms of the act of 1907, to pay annually to the state. It was claimed in the petition for the writ of mandamus that this refusal "created a cloud upon the title of your petitioner to all of the right and property and franchises vested in it by the provisions of said act and by reason of such refusal your petitioner suffers and unless the writ herein prayed for is granted by this Honorable Court, will hereafter suffer, irreparable injury on account" of the facts which are enumerated in the petition (R., pp. 17, 18). The petition states the particulars in which such injury would

result ; and it was further averred that the state treasurer refused to receive the money "in order to aid in procuring the nullification of the said special act by a repeal thereof by legistative action, whereby your petitioner would be seriously prejudiced for reasons set forth below, in effectively asserting in an appropriate proceeding that said special act is constitutional and procuring an adjudication to that effect." The petition then sets forth that the question of the constitutionality of the act had been referred to the Attorney General and that he had rendered an opinion holding that it was unconstitutional upon the four grounds which were recited in Chapter 452 of the Laws of 1913. It is also stated that, in accordance with the opinion of the Attorney General, a repealing act had been introduced, and that if it was enacted the petitioner would be irrevocably injured (R., p. 20).

While no violation of any specific provision of the Federal Constitution was alleged in the petition, the allegation of the foregoing facts would necessarily bring the case within the prohibition of Article 1, Sec. 10 of the Constitution, because a threat was made both to enact a statute and to "exercise" an "authority" which would impair the obligation of the contract. The peculiar and irreparable character of this threatened injury will appear from what is said in the Seventeenth Point of this Brief.

We submit, therefore, that the decision of the Court of Appeals "is in favor of the validity" of the "authority exercised" by the officers representing the three departments of the State Government, and that this affords ground for this court to entertain jurisdiction under the provisions of Section 237 of the Judicial Code.

We see no reason why the facts stated above do not vest this jurisdiction on the further ground that the decision in failing to accord to the Company its contract rights, decided against a "title, right, privilege or immunity" to which it was entitled under the Constitution. Jurisdiction would in that case be referred to a later clause in Section 327, the meaning of which is discussed below.

C.

It was claimed in the state courts that by the acts of the State government, including the passage of the Repealing Acts of 1913 and the decision of the State courts, the plaintiff-in-error had been deprived of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution. This was a claim under the Constitution to a "title" or "right" within the meaning of Section 237 of the Judicial Code, and the decision was against such title or right. There was, therefore, jurisdiction in this court to review the decision.

What a "title, right, privilege or immunity is", within the meaning of Section 237, has been considered by this court in a variety of cases arising under the Federal Constitution. The decisions hold that wherever a right or title has been claimed to be given by the Federal Constitution or Statutes, and there is a plausible ground for setting up or claiming that a decision of a state court is against the title or right thus protected, the jurisdiction of this court attaches under Section 237 of the code.

The decisions of the court in *St. Louis & Iron Mountain Ry. vs. Taylor*, 210 U. S., 281, and *Atchison, Topeka and Santa Fe Ry. Co. vs. Sowers*, 213 U. S., 55, are, we submit, controlling in this case.

In *St. Louis & Iron Mountain Ry. vs. Taylor*, the court, while saying (page 291), that it had not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts, added (p. 292):

> "* * * Congress has regulated and limited the appellate jurisdiction of this court over the state courts by Sec. 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock v. Memphis*, 20 Wall., 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the state courts 'where any title,

> right, privilege, or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such * * * statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States."

The court then cites some authorities and adds:

> "* * * The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. *The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.*"

In *Atchison, Topeka and Santa Fe Ry. Company vs. Sowers, supra,* the action was for personal injuries, and the state court denied the validity of a statute of another state and its binding force to control the action. The court held that this was in violation of Article 4 of Section 1 of the Federal Constitution, and that there was jurisdiction in the court under Section 709 of the Revised Statutes, to entertain the writ of error. The court said (p. 62) that it had the power, under

Section 709, to " review final judgments in the highest court of the State in which a decision in the suit could be had, where any title, right, privilege or immunity under the Federal Constitution or under any statute of or authority exercised under the United States is specially claimed and denied."

In *Chicago, Burlington and Quincy R. R. Co. vs. Chicago*, 166 U. S., 226, it is said (p. 241):

> " In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

In *Williams vs. Bruffy*, 96 U. S., 176, a question arose under an act of the State of Virginia giving force to an act of the Confederate States. The court considered the question of jurisdiction under the provision of the act of 1867, which is similar to that of Section 237 of the Judicial Code which vests jurisdiction in the court to review a decision by a state court against a title, right, privilege or immunity asserted under the Constitution. The right or immunity relied upon arose under the provision of the Constitution of the United States declaring that " the citizens of each state shall be entitled to all of the privileges and immunities of citizens in the several states." It was held that the provision of the act of 1867 referred to conferred jurisdiction upon the Court.

In *American Sugar Refining Company vs. Louisiana*, 179 U. S., 89, a state statute imposed a license tax upon persons and corporations carrying on the business of refining sugar, but exempted planters and farmers refining and grinding their own sugar. It was claimed that this statute was void as being in volation of the Fourteenth Amendment, because it did not afford equal protection of the law to sugar refineries. The case came up on a writ of error to the Supreme Court of the State.

Justice BROWN, delivering the opinion of the court, said (p. 91):

> "* * * As, however, the protection of the Fourteenth Amendment was invoked in the answer, and, as this defence is at least plausible upon its face, the motion to dismiss must be denied."

To the same effect is

Spencer vs. Merchant, 125 U. S., 345.

See, also,

Yick Wo vs. Hopkins, 118 U. S., 356.
Bohanan vs. Nebraska, 118 U. S., 231.
Ex parte Virginia, 100 U. S., 339.
Scott vs. McNeal, 154 U. S., 34.
Bethell vs. Demaret, 10 Wall., 537.
Williams vs. Eggleston, 170 U. S., 304.
Logan Co. Bank vs. Townsend, 139 U. S., 67.
Covington & L. T. R. Co. vs. Sandford, 164 U. S., 578.
Rogers vs. Alabama, 192 U. S., 226.
Anderson vs. Carkins, 135 U. S., 483.

The manner in which the right or title set up under the Constitution has been interfered with or denied is not material. The court will take jurisdiction whether such interference or denial be by decision of the State courts or by the act of agents of the State Government.

In *Chicago, B. & Q. R. R. Co. vs. Chicago, supra*, the court said (p. 233):

> "* * * But it must be observed that the prohibitions of the amendment (*i. e.*, Fourteenth) refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with

power to annul or evade it.' * * * But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

In *Yick Wo vs. Hopkins, supra*, the Court said (p. 373):

"* * * Whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Scott vs. McNeal*, 154 U. S., 34 (Writ of Error to the Supreme Court of Washington) letters of administration were issued on the estate of the plaintiff who had disappeared and been absent more than seven years. The real estate was sold by order of court and came into possession of the defendant. The plaintiff brought the action to regain possession of his property. The State Court held that the probate proceedings were not void and that the defendant had acquired a good title. The plaintiff sued out a writ of error on the theory that the probate proceedings were void and that the

judgment of the State Court sustaining them deprived him of property without due process of law, contrary to the Fourteenth Amendment.

The judgment was reversed. Opinion by Justice GRAY (p. 45):

> "The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'. These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. *Virginia v. Reeves*, 100 U. S., 313, 318, 319; *Ex parte* Virginia, 100 U. S., 339, 346; *Neal v. Delaware*, 103 U. S., 370, 397. And the first one, as said by Chief Justice WAITE in *United States v. Cruikshank*, 92 U. S., 542, 554, repeating the words of Mr. Justice JOHNSON in *Bank of Columbia v. Okely*, 4 Wheat., 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"
>
> See, also, *McCullough vs. Virginia, supra.*

We submit, therefore, that, under the foregoing circumstances, the jurisdiction of this court may properly be based upon the fact that a "right * * * is claimed under the Constitution * * * and the decision is against the * * * right * * * especially set up or claimed * * * under the Constitution."

D.

"Although the State Appellate Court may not have referred to the Constitutional questions in its opinion, this Court cannot regard such silence as a condemnation of the time at or manner in which, those questions were raised; and if the record

shows that they were raised in that court, this court has jurisdiction."

International Harvester Company of America vs. State of Missouri, 234 U. S., 199.
Chicago, Burlington & Quincy R. R. Co. vs. Chicago, supra.
Haire vs. Rice, 204 U. S., 291.
Dewey vs. Des Moines, 173 U. S., 193.
Chapin vs. Fie, 179 U. S., 127.

And even where the question is not raised, if it is "necessarily involved" in the decision of the State Court, this Court has jurisdiction.

Spencer vs. Merchant, supra.
Scott vs. McNeal, supra.

E.

The jurisdiction of this Court has, perhaps, been expressly extended in such a way as to include the case at bar by the Act of December 23, 1914, amending Section 237 of the Judicial Code.

SECOND POINT.

The State had the power to grant to the Long Sault Development Company the property rights and franchises described in Chapter 355 of the Laws of 1907.

The sole ground upon which the Court of Appeals based its decision was that, by the Act of 1907 the legislature attempted to transfer to the Long Sault Company complete and irrevocable control of the navigation of the St. Lawrence River, and that this amounted to an abdication on the part of the State of a right or power vested in it in its sovereign capacity, and was, therefore, void.

In delivering the opinion of the majority of the court,

Chief Judge BARTLETT said (Record, page 70) that the grant made by the Act of 1907

> " virtually turns over to the corporation entire control of navigation at the Long Sault rapids (provided, of course, that the consent of Congress can be obtained). All that the corporation must do is to construct the contemplated works, pay the stipulated sums and keep the navigation as good as it is now. No matter how much the interests of the public may demand the improvement thereof in the future, the state will be powerless to act either directly or by constraint upon the corporation. * * * The grant is objectionable on account of the abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private corporation. * * * The point that I desire to emphasize is that the legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence to a private company to maintain and control navigation thereon, thereby parting for all time with its own power to improve such navigation. The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest."

If the grant had the effect assumed by Judge BARTLETT, we would not question the soundness of the general propositions of law which he announces; but, as we shall show below, they have no application to the Act of 1907 because no *ultra vires* grant of the control of navigation was attempted to be made.

A.

The grant was made with the intention of improving navigation and is, therefore, to be interpreted as intended to authorize the use for power purposes of only so much of the surplus waters of the river as remained after the needs of navigation had been provided for.

The Court of Appeals seems to have approached a consideration of the Act of 1907 with the idea that there is something against public policy in a grant to a private corporation of the right to "use the waters of" the river in connection with a water-power project, *unless* the grant *expressly* provides that the amount of water to be used should not be so great as to interfere with navigation. Although Chief Judge BARTLETT said in the opinion of the court that "in this discussion I assume that the improvement of navigation was a real, even if subsidiary, purpose of the enactment, and not merely a cloak for a power development project", yet it would seem that his conclusion was logically based upon a contrary assumption; for if the *intention* was to *improve* navigation, how can it be said that the grant of a right, in connection with the operation of the power plant, "to take and use the waters of the river at and above" the works, indicates an intention to grant the right to use so much of the waters that navigation would be *impaired?* And when it is considered that the grant was further qualified by the provision (Section 3) that regard was "always" to be "had to the amount of the natural flow of water in said river as affecting its navigability from time to time," the weakness of Judge BARTLETT'S conclusion becomes quite manifest.

Even if it be assumed that the State had in its sovereign capacity some control of the navigation of the river, which existed independently of that possessed by the Federal Government, the Act of 1907 shows that it was not the intention of the legislature that there should be a grant of such control. On the contrary, it is clear that it was intended to grant the right to use, after Congress had acted, only the *surplus* waters not needed for navigation.

In its title the act is stated to be an act, (1) to incorporate

the company, (2) to authorize the company to construct the dam and other works, " for the purpose ", (*a*) of improving navigation of the St Lawrence river, and (*b*) developing power from the waters thereof.

Section 3 of the act purports to grant the right (1) to erect, maintain and operate " such dam or dams * * * and other works appurtenant thereto as may be proper or useful for the purpose of the development of water-power and of electrical power and energy therefrom ", (2) to erect and operate power houses and other appliances " for the development of electrical power and energy ", (3) to take and use the waters of said river at and " above the points of location of said works heretofore authorized " and (4) " to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges."

It is quite obvious that this grant was made in connection with the water power project and that it was for that purpose that the right to " use the waters of said river " was given; and when the grant is read in connection the last paragraph of Section 4 providing that the use of "all of the waters of the St. Lawrence River south of the international boundary line" was to be "*subject only to the lawful control of the United States Government*," it is clear that the legislature supposed that it could authorize the utilization of the water power of the river and at the same time protect the interests of navigation by referring the whole subject to the Federal Government. This conclusion is confirmed by the other provision of Section 3 that the grant was conditioned upon compliance by the Company in all respects with " any act of the Congress of the United States relating thereto."

It cannot be *presumed* in construing the Act that Congress would authorize the use by a private corporation, for its own profit, of water which was necessary or convenient for navigation purposes, and it must, therefore, follow by a fair implication that the grant to the Company was to be limited to the use of such surplus waters as Congress and the Federal Government should decide might, without detriment to navigation, be used for the purpose of producing power, and which, if the state itself had undertaken to construct the dam, it would have been entitled to use for that purpose.

In the case of *Kaukauna Co. vs. Green Bay &c. Canal*, 142 U. S., 254, this Court said (p. 275):

> "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. *Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement.*"

Judge COLLIN in his dissenting opinion in the Court of Appeals quite correctly said (Record, p. 80):

> "The act in this regard was, in effect, the grant * * * of the right to use such surplus water as navigation regulated and controlled by Congress should not require for a water power, the grant, however, to have and take no effect until Congress had acted in the matter."

The grant of the right to build a bridge "across or partly across St. Lawrence River" is explained by considerations similar to those mentioned above in relation to a dam; and a reference to the diagrams attached to the record will show that the erection of bridges would be necessary across some of the channels of the river to gain access to the works to be erected. It will be observed that the bridges referred to are "upon over and *in connection with* said dam or dams and other works," and they are, therefore, those which are incidental to the power project. So long as they do not obstruct navigation, and so long as they are within the state boundary lines of New York, the power rested in the State to permit their erection, subject, of course, and by the act expressly made subject, to the approval of the United States Government.

B.

The grant made by the act of 1907 was consonant with the long established public policy of the State in relation to water power franchises. The validity of such a grant is clear and has never before been questioned.

It need not be denied that the chief purpose of the incorporators of the Long Sault Company was to erect a great power plant. But that would not make it necessary to express the condition that it should be so built and operated as not to interfere with navigation; for that condition is to be implied in every such grant and it is implied in this one, if, indeed, for the reasons stated above, it is not clearly expressed. The legislature of the State of New York in numerous cases has granted to individuals or private corporations the exclusive right to construct dams across navigable streams and to enjoy the water power created thereby; but it has made in such grants only the most general provisions for the preservation of navigation, and in only one or two instances has it provided for its improvement. Generally the language of the grants has been more comprehensive and exclusive than that used in the act of 1907. In an

opinion of Mr. George P. Decker, counsel for the Forest, Fish and Game Commission of the State of New York (a copy of which will be submitted to the court), he states that prior to 1853, 175 special acts granting dam privileges had been passed. These special acts followed a policy adopted by the state in the General Dam Act passed by the legislature April 2, 1813 (Chapter XLVII. of the Revised Laws of 1813), which not only made general provision for the erection of dams across the rivers of the state, but also granted special and exclusive dam privileges to a number of individuals who were named in the act. Many of the grants, in addition to giving the exclusive right to the water power, vested in the grantee the title of the state to the land under water upon which the dams and the works connected therewith, were to be located. A list of about 150 special legislative grants appears in Appendix C attached to this Brief. This list may not include all of the grants which have been made but it is sufficient as a basis for some pertinent generalizations made in Appendix D. The practice prior to 1840 differed materially from that prevailing since 1882, as is also explained in Appendix D. Generally since 1882, the legislative acts, besides authorizing the erection by private corporations of dams and power plants, have provided for the grant to such corporations of the interest of the State in the land under water covered by the dams and other works. It has always been supposed that such acts created franchises, entitling the grantees to have the beneficial use of the water-power, and that they could not be deprived of such franchises without compensation. A few grants made since 1895 are referred to in Appendix D to show the character of recent grants made for water power purposes.

The practice of the State of New York in developing its streams for navigation purposes has been different from that of other states of the Union. It may be that this is due to the fact that a system of canals has been established which have frequently been fed by waters of rivers which themselves were not navigable in their natural state, but which were susceptible of improvement, at least in a limited degree, for that purpose. This fact may explain why in the numerous

special acts referred to above, provisions for preserving and maintaining navigation have been omitted.

In the prevailing opinion of the Appellate Division it is said (Record, p. 43):

> "This right (*i. e.*, to become the owner of State lands under water) has been frequently given in connection with franchises for dams in this State, although some private dams have been built upon State lands and so seems incidental to the subject of the construction of the dam rather than a distinct subject by itself."

In many states there are statutes providing for the organization of private corporations for the purpose of improving the navigation of rivers by the erection of dams, the corporations receiving compensation for the expense of the improvement from the right to collect tolls from vessels making use of the improved facilities. This subject is referred to in 1 *Farnham on Water and Water-rights*, page 384, as follows:

> "The cost of the improvement of streams is at times so great, and the benefit from it is so likely, in many instances, to be purely local, that the consent of the legislature to make the improvement at public expense cannot be secured. In addition to this, many of the State constitutions have forbidden the State from entering upon works of internal improvement. The consequence is that, in order to secure the improvement of particular streams, it must be done by private enterprise. For this purpose, charters are granted to improvement companies authorizing them to take possession of the stream, make the necessary improvements, and recover their compensation by the exaction of a toll upon transportation obtaining the benefit of the improvement."

The rights of such improvement companies were dealt with by the Supreme Court of the United States in the case of *Monongahela Navigation Company vs. United States*, 148 U. S., 312. The Navigation Company, under authority of a special

act of the legislature of Pennsylvania, constructed a series of seven dams and locks, whereby the river was made navigable for large steamboats at all seasons of the year and facilities were furnished for an extensive commerce. It was contended that the Company had acquired from the State a vested right to collect tolls, of which it could not be deprived by the United States without due compensation.

The Court took the view which it had previously expressed in its decision in *Huse vs. Glover*, 119 U. S., 543, 548, that improvements to navigation made by the construction of dams and locks were like wharves and docks constructed to facilitate commerce. The Court said (p. 341):

> " * * * The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual."

In the leading case of *Langdon vs. The Mayor*, 93 N. Y., 129, there was the familiar case of a grant by the State of land under water for the building of a wharf. This transfer was held to be valid. The Court, in deciding the case, said (p. 156):

> " The legislature of this State, except as restrained by constitutional inhibitions, could authorize a boom to be placed for private use across the Hudson River, or grant its exclusive use to individuals, and it could grant in fee any of the inland navigable lakes wholly within this State and its grants thus made, would be irrevocable. (*Livingston v. Van Ingen*, 9 Johns., 507; *Gibbons v. Ogden*, 17 *id.* 488; s. c., 9 Wheat., 1.) These powers result from its sovereignty, and the absolute control which, in consequence thereof, it has over the public domain within its limits. The right to grant the

navigable waters is as absolute and uncontrollable (except as restrained by constitutional checks) as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people.

"If the grant to Astor had been made directly by the legislature, or by the commissioners of the land office, under its authority, it would have been inviolable as a contract within the protection of the Federal Constitution, the obligation of which no legislative act could impair (*Fletcher vs. Peck*, 6 Cranch, 136). It matters not that the grant would limit the power of the State in the exercise of its sovereignty over the public waters, and would so far limit and control future legislatures. *The same is true of all grants by the State of any part of the public domain.* When valid grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation."

See, also, *Commissioners of the Sinking Fund vs. Green and Barren River Navigation Co.*, 79 Ky., 73, *Veazie vs. Moor*, 14 How., 568, *Carson River L. Co. vs. Bassett*, 2 Nev., 249, *McReynolds vs. Smallhouse*, 71 Ky., 447.

There was nothing in the laws or in the constitution of the State of New York in 1907, which would have prevented the state itself from undertaking the expense of improving the navigation of the St. Lawrence River in precisely the manner in which the Long Sault Development Company was authorized to do so, subject, of course, to action by Congress and the provisions of the Federal laws, to which we will refer below. Nor can there be any doubt that the state would have had the power to authorize a person or a private corporation, in its place, to construct the dam upon such terms as the legislature might determine to be advantageous, granting by way of compensation for the work, such participation in the profits of the water-power as might be agreed upon. In principle, the

right to share in such profits is not different from the right to collect tolls from vessels enjoying the improved facilities of navigation erected at the expense of a private corporation; and that kind of compensation has not been unusual.

The plan of compensation adopted in the Long Sault case has had the sanction of legislative practice in this State for many years. In one of the legislative grants made since 1882, referred to in note (*a*), an act of the legislature specifically recited that certain necessary public purposes which could be accomplished by the development of the Genesee River ought not to be undertaken at public expense, and therefore the Genesee River Company was organized and was, in consideration of constructing the necessary works at its own expense, granted the beneficial interest in the water-power incidentally made available by the erection of the dam, which was the principal feature of the works. Before the passage of the Long Sault act we believe that there had never been a case where provision had been made for participation by the State of New York in the profits of a water-power plant constructed in a public stream by the authority of the legislature. One such case

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(*a*) The Genesee River Company was organized under the provisions of Chapter 605 of the New York Laws of 1898. The act first recited that it was necessary "for the improvement and preservation of the public health, for the checking of floods, for the furnishing of water for the enlarged Erie canal, and for the supplying of pure and wholesome water for municipal purposes", that the land described in the act should be taken "for the public uses aforesaid," and that "in the judgment of this legislature" the compensation to be paid for such land should not be made by the State but that the public purposes indicated should be attained as prescribed in the act and by the organization of the corporation created by the act. The Company was authorized to build a dam across the Genesee River and was given "the right to utilize all the water-power incidentally created by the construction of said main dam or reservoir" and to construct certain other structures "for the development of hydraulic and electrical power and for the purpose of making and transmitting compressed air and for other purposes." The Company was authorized to sell all water and electrical power generated at the dam for its exclusive benefit. There was no limitation upon the period of enjoyment of the rights granted by the act, and no control of navigation of the stream was reserved.

has occurred since and is referred to in note (*b*). This unusual feature of the Long Sault charter was no doubt a result of the growth of the idea that the State is entitled to and should reserve to itself a participation in the profits of the development of its natural resources.

That a state may enter into such a contract is clearly established by the decision of this court in *Kaukauna Water Power Company vs. Green Bay & Mississippi Canal Company, supra.* In that case this court said (p. 273):

> "* * * if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. * * * As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement. * * *
>
> "* * * Indeed, it seems to have been the practice, not only in New York but in Ohio, in Wis-

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(*b*) A similar provision was made in the case of The Clinton Mills Power Company, which was authorized by Chapter 514 of the New York Laws of 1911 to rebuild and maintain a dam across the Susquehanna River not exceeding ten feet in height, at a place where the right to build a dam had been granted in 1813 to certain individuals. The grant was for fifty years, and during that time the State was to receive 75 cents per horse-power produced, that amount to be readjusted every five years. The act contained certain provisions protecting "mills now operating higher up on said stream," and was declared to be "a public act, and the land flowed with water as herein provided is hereby declared to be for public use." There was no provision, however, reserving to the State the right to improve or control navigation or giving the public any compensatory advantage except that referred to above. Some of the provisions of the act were obviously suggested by the Long Sault charter.

> consin, and perhaps in other States, in authorizing the erection of dams for the purpose of navigation or other public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the State; and where the surplus thus created was a mere incident to securing an adequate amount of water for the public improvement, such legislation, it is believed, has been uniformly sustained."

An arrangement such as that referred to by the Court might be regarded not so much as constituting a franchise as being a public contract made by the State for the erection of works to improve navigation, the water-power incidentally created being used to defray the cost. The water-power is, so to say, a by-product of a public improvement to be disposed of for the public benefit.

In *Green Bay & Mississippi Canal Company vs. Patten Paper Company*, 172 U. S., 58, referring to the legislation which was under consideration in the Kaukauna Company case, the Supreme Court said (p. 81), that that legislation "has had in view the dedication of the water-powers incidentally created by the dams and canal to raising a fund to aid in the erection, completion and maintenance of the public works."

In *Stockton vs. Baltimore & N. Y. R. Co.*, 32 Fed., 9, Justice BRADLEY referring to the same power when exercised by the Federal Government, said (p. 15), that

> "* * * if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise."

The contract made in the *Monongahela* case is another illustration of the exercise of the power. Commenting on that feature of the case, this court, in *Greenleaf Lumber Company vs. Garrison*, 237 U. S., 251, said at p. 266:

> "It (the company), to repeat, constructed a public work, having no other power to do so but the authority

conferred upon it by the State and by Congress—invited, indeed, to do so and given as its compensation a right to take tolls for the use of the works. This court well said that such right was as much the consideration of the service rendered as the material property constructed."

In *Palmer vs. Commissioners*, 3 McLean's U. S. Rep., 226, approved in 107 U. S., 678, 689, it is said (p. 227) :

"Now this provision does not prevent a state from improving the navigableness of these waters, by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river, which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass, with little or no delay, and without charge."

In *Water Power Co. vs. Circuit Judge*, 133 Mich., 48, it is said (p. 54) :

"* * * If the fact that the taking results in improving the navigability of a stream proves said taking to be a public necessity, the statute is constitutional, notwithstanding the fact that one of the purposes of improving the navigability of the stream is to obtain a waterpower; for land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved."

In Cooley's Constitutional Limitations, 4th Ed. (p. 663), it is said :

"Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public high-

ways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public advantage expected from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise."

* * * * * * *

The grant of the right to take such tolls or to share in the profits of a water power plant is not, in any true sense of the word, a *franchise* at all; it merely amounts to a contract whereby in consideration of relieving the state of the expense of erecting a great public work designed to produce power, and at the same time to improve navigation, the state grants to the contractor a participation in the profits of what is built. The state and the contractor thus become partners.

C.

The principle of Illinois Central Railroad Company vs. Illinois is not applicable.

Chief Judge BARTLETT, relied upon the principle laid down by this court in *Illinois Central Railroad Company vs. Illinois*, 146 U. S., 387, and quoted from the opinion of the court in that case the following extract (p. 453) viz.:

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

In the *Illinois Railway* case a vast area of land under water, including substantially all the harbor of the City of Chicago, had been transferred by the legislature to a private corporation. The grant was of such magnitude and so much beyond the requirements, and so unnecessary for the exercise of the corporate functions of the grantee, and the purpose of the Illinois legislature to turn over one of the most important harbors of the country to a private corporation was so obviously inconsistent with the public interest, that the ingenuity of the Court was invoked to devise a principle which would protect the people from the acts of their own representatives. By a decision of four to three, it was held that the legislature was without power to make the grant. The principle of the decision has been applied only in instances of obvious breaches of trust by State legislatures such as existed in *Coxe vs. State*, 144 N. Y., 396.

The decision is one of those rare instances in which on account of the enormity of the evil the Court came measurably near substituting its own opinion and discretion for that of the legislature. For reasons already given we think it sufficiently appears that the case at bar presents no features calling for the application of any such doctrine. We will call attention in another part of this brief to some extracts from the opinion of the court in the *Chicago Water Front* case, but at this point it will suffice to state that the record in that case showed that the Illinois Railway Company had at the time of the commencement of the suit already availed of all the land under water necessary for the railroad purposes covered by its charter, and that its effort was in addition to confirm its title to the land under the water of the entire Chicago harbor, and to "place the same in the hands of a private corporation *created for a different purpose*," one limited to transportation of passengers and freight between distant points and the city." The grant therefore was not made to enable the company to perform its corporate functions, nor yet to enable the City of Chicago through the Railroad Company to improve the Harbor for the benefit of the public.

D.

The conclusions to which we are led by the foregoing considerations are confirmed by the fact that, by Federal Statutes and Treaties of the United States and by a uniform policy of the Executive Department, the control of the navigation of the St. Lawrence River had prior to 1907 been effectively assumed by the Federal Government. If any control remained in the State it was largely theoretical or related only to local aids to commerce such as piers.

Neither the extent of the grant made by the Act of 1907 nor the intention of the legislature in making it can be adequately understood without an inquiry as to how far the Federal Government had asserted control of the navigation of the St. Lawrence River, and how far such control had, either actually or potentially, superseded the control of such navigation which the State might originally have possessed. From such an inquiry we shall find that the Federal Government had by Acts of Congress and Treaties with Great Britain necessarily practically assumed complete control of the navigation of the river, and that such control as remained still vested in the State to which the grant could be deemed to refer, was largely theoretical or related to local structures in aid of commerce such as piers. But if we go too far in this assertion, and if, in spite of action which had prior to 1907 been taken by the Federal Government, there still remained vested in the State any control of navigation, yet, as the grant was made expressly dependent upon approval by Congress and the Federal Government, it was plainly anticipated that before the grant would go into effect so as to involve conditions of navigation, either, (*a*) complete and exclusive control would have been assumed by the Federal Government, or, (*b*) if, by the terms of its approval the Federal Government left any control at all in the State, it would be limited to the erection and maintainance of such local structures as piers, wharves, and other similar local aids to commerce.

When the Long Sault Act was passed, there were in effect three acts of Congress under which the Federal Government had prohibited the erection of structures affecting the naviga-

bility of navigable rivers, except with the consent of Congress and the War Department. Two of these acts specifically dealt with dams. Section 3 of the River and Harbor Bill of 1892, approved July 13, 1892 (27 U. S. Stats. at Large, page 110), does not seem to have been repealed at that time, but it is not necessary to refer to its provisions because two acts of later date assert the jurisdiction of the United States in a more comprehensive and exclusive manner.

The first of these is the River and Harbor Act of March 3, 1899, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes." (2 Supplement to the Revised Statutes of United States, page 994; 30 Stat. L., 1121.) This Act provides as follows, viz:

> "SECTION 9: That it shall not be lawful to construct or commence the construction of any bridge, *dam*, dyke or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States *until the consent of Congress to the building of such structures shall have been obtained* and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: * * *
>
> SECTION 10. (2) That the creation of *any obstruction not affirmatively authorized by Congress*, to the navigable capacity of any of the waters of the United States is hereby prohibited;
>
> and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any * * * canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War;
>
> and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, * * * the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and

authorized by the Secretary of War prior to beginning the same."

It will be perceived that this act provides that, (1) no dam shall be constructed, or even commenced, *until the consent of Congress has been obtained*, (2), that no obstruction "to the navigable capacity of any of the waters of the United States" shall be created unless "affirmatively authorized by Congress" and, (3), in order that structures which *might* tend to obstruct such "navigable capacity" may not be erected until after it may be determined whether they would cause such obstruction, the erection of "any wharf, pier * * * or other structures * * * outside established harbor lines," or in any part of the waters where no such lines have been established, is prohibited unless it has been approved by the Chief of Engineers and the Secretary of War.

The second act dealing with the erection of dams is the so-called Dam Act approved June 21, 1906 (34 U. S. Stats. at Large, page 386), and entitled "An Act to regulate the construction of dams across navigable waters." It deals exclusively with dams. It provides as follows, viz.:

> "That when hereafter authority is granted by Congress to any persons to construct and maintain a dam for water power or other purposes across any of the navigable waters of the United States, such dams shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineer for their approval or until they shall have approved such plans and specifications and the location of such dam and accessory works. * * *
>
> "Provided that in approving said plans and location such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States which may include the condi-

tion that such persons shall construct, maintain and operate, without expense to the United States, in connection with said dam and appurtenant works, a lock or locks, booms, sluices, or any other structures which the Secretary of War and the Chief of Engineers at any time may deem necessary in the interest of navigation in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the person owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States a free use of waterpower for building and operating such constructions."

* * * * * *

"That the right is hereby reserved to the United States to construct, maintain and operate, in connection with any dam built under the provisions of this act, a suitable lock or locks or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necessary to provide proper facilities for navigation" (Section 2).

* * * * * *

"That the person, company or corporation building, maintaining or operating any dam and appurtenant works under the provisions of this act, shall be liable for any damage that may be inflicted thereby upon private property either by overflow or otherwise" (Section 3).

The other provisions of the act relate to the forfeiture of rights and the removal of the dam or other structures for failure to conform to the requirements of the act; and finally the right is reserved "to alter, amend or repeal the act as to any dam constructed under its terms and without any liability on the part of the United States to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions."

In addition to the foregoing acts of Congress, the Federal Government had prior to 1907, by two treaties with Great

Britain, assumed obligations towards that country and Canada which could not be discharged without assuming control of the navigation of the river.

The first of these treaties was the Webster-Ashburton Treaty of 1842 ("Treaties, Conventions, etc., between the United States and Other Powers," Malloy, Vol. 1, page 650). By Article VII (p. 654), of that treaty it was provided as follows, viz.:

> "It is further agreed that the channels in the river St. Lawrence on both sides of Long Sault Islands and of Barnhart Island * * * shall be equally free and open to the ships, vessels, and boats of both parties."

The other treaty was the Treaty of Washington of 1871, ("Treaties, Conventions, etc., between the United States and Other Powers," Malloy, Vol. 1, page 700), by which Article XXVII (p. 711), provided as follows, viz.:

> "The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence and other canals in the Dominion on terms of equality with the inhabitants of the Dominion; and the Government of the United States * * * further engages to urge upon the state governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the high contracting parties, on terms of equality with the inhabitants of the United States."

In addition to these treaties it is pertinent to call attention to the "Convention Concerning the Boundary Waters between the United States and Canada," entered into between Great Britain and the United States, which was signed January 11, 1909, and after ratification by the Senate, was proclaimed on May 13th, 1910. ("Treaties, Conventions, etc., between the United States and Other Powers," compiled by Garfield Charles, Vol. 3, page 39). Although this Convention

did not go into effect until after 1907 it is here referred to, first, because its provisions are a natural development of the general provisions of the treaties of 1842 and 1871, dealing with the same general subject, and, second, because it affords a striking illustration of the extent to which the International character of the St. Lawrence River makes it necessary for the Federal Government to assume control of its navigation, to the exclusion of such control by the State of New York. The principal provisions of the Convention are set forth in Appendix E attached to this brief.

In view of the treaties and acts of Congress thus shown to be in effect in 1907 it does not seem to need argument to show that the Federal Government had before that year assumed, or had adopted a policy which made it necessary whenever the occasion might arise for it to assume, practically complete control of the navigation of the St. Lawrence and of all structures erected therein which could affect, directly or indirectly, the navigability of the river. The structures contemplated by the provisions of the Long Sault act of 1907 were of the latter character; and the terms of the act itself afford ample evidence that it was framed with special reference to the requirements of the acts of Congress in effect when it was passed, and particularly to those provisions of the act of 1906 concerning the erection of dams :

I.

An analysis of the Long Sault Act of 1907, and a comparison of its provisions with the requirement of Federal statutes and treaties above referred to, show that the legislature did not intend that the act should become effective to vest in the Company the right to control navigation.

Sections 3, 4 and 9 of the Long Sault Act of 1907 contain all the provisions of the act which could possibly affect the control of navigation, the other sections of the act relating only to the corporate purposes and powers.

Section 3 provides as follows, viz. :

> " Said corporation shall have the right to erect, construct, maintain, operate and use all such dam or

dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant, thereto as may be proper or useful for the purpose of the development of water power, and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the St. Lawrence River, * * * (* * * across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart island either independently or in connection with like works now erected, or to be erected in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house * * * and * * * appliances * * * for the development of electrical power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized, and to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the St. Lawrence river, with the approaches thereto, for the use of foot passengers, animals and vehicles, * * * and to charge reasonable rates of toll for passage thereon."

The broad terms of this grant are made subject to the following "*express conditions*," viz:

(1) That said "corporation shall make just compensation to all persons injured by the exercise of the rights and privileges heretofore granted."

This condition suggests that the Legislature had in mind Section 3 of the Dam Act of 1906, which provided that persons building, maintaining or operating a dam should be "liable for any damage that may be inflicted thereby upon private property either by overflow or otherwise;"

(2) That said corporation "shall also erect and construct a lock or locks as may be required by the United States of America, and shall provide electrical power or energy for the maintenance, operation and use of said lock or locks, free of charge, and shall in all other respects perform, fulfil, and abide by all and singular the conditions and provisions of this act, and also of any act of the congress of the United States relating thereto."

It is significant, in connection with the foregoing provision, that by the first section of the Dam Act, passed less than a year before, it was provided that the Chief of Engineers and the Secretary of War, in order "to protect the present and future interests of the United States" might impose the condition that the persons erecting a dam should "construct, maintain and operate, without expense to the United States * * * a lock or locks * * * which the Secretary of war and the Chief of Engineers at any time may deem necessary in the interest of navigation;"

(3) That the Company should comply with "any act of the congress of the United States."

It was quite natural that this condition should have been imposed, since, under the River and Harbor Act of March 3, 1899, it was not lawful for any person or corporation to build a dam across navigable waters of the United States "*until the consent of* CONGRESS *to the building of such structures" had been obtained;* and Congress, by passing the Dam Act of 1906, continuing the same legislative policy, had provided that it should apply only "*when, hereafter, authority is granted by Congress* to any persons to construct and maintain a dam for water power or other purposes across any of the navigable waters of the United States."

It would thus appear, that in 1907, there was no general Federal legislation under which the Long Sault Company could have obtained the right to construct the proposed dam and that it was, therefore, necessary to obtain a special act of Congress. And it was such a special act that the legislature unquestionably had in mind in requiring compliance with "any act of the Congress of the United States relating thereto."

In addition to the three "express conditions" above mentioned, Section 4 of the Act of 1907 further provided that "after

the congress of the United States shall authorize the construction of dams, locks and canals hereby authorized," the Commissioners of the Land Office were to be authorized, on the payment by the company of $10,000, to convey to it "lands under the waters of the St. Lawrence river to be covered or occupied by said works and locks and power-houses."

This provision was undoubtedly designed to enable the Company to comply with the provision of the first section of the Dam Act of 1906, which provided that,

> "whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, *the person owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches*, and shall grant to the United States a free use of water power for building and operating such constructions."

On account of this provision, unless by Section 4 of the act of 1907, the Company had been enabled to acquire title to the land under water, it would have been impossible for it to avail of the grant at all. And the postponement of the transfer by the State until after Congress had acted is accounted for by the facts, first, that there would have been no adequate consideration for an earlier grant, and, second, that until after such congressional action it was not possible to fix the location of the land under water on which the works were to be placed.

Provision is further made in Section 4 of the Act of 1907 for the payment each year by the company of a certain sum to be fixed according to the amount of power produced. The amount of the payments are stated to be "based upon the assumption that the said corporation under the authority of this act, *subject only to the lawful control of the United States Government*, may use for the purposes herein specified at the places herein mentioned, all the waters of the St. Lawrence River south of the international boundary line." It is then provided that in the event that the Dominion of Canada shall require payment

for the use of the waters north of the international boundary line, a proportionate reduction shall be made in the amount to be paid to the State of New York.

Here again is a recognition of the facts that the use of the waters of the river was subject to the lawful control of the Federal Government, and that the International character of the river added a further obstacle to a grant of any control of its waters without the consent of the that Government. The legislature will be presumed to have had knowledge in this connection of the Webster-Ashburton Treaty of 1842, which made it necessary for the Federal government to assert control of navigation in the channels "*on both sides of Long Sault islands and of Barnhart island*," including, as a reference to the map, Exhibits G and H, will show, the entire river at the Long Sault Rapids for a distance of over ten miles.

Finally, by Section 9 of the Act of 1907, the time for the commencement of the work of constructing the dam is fixed with reference to the authorization by the Congress of the United States of the "construction of dams, locks and canals hereby authorized," for it is expressly required that the work should be commenced within one year after such authorization. By the terms of Section 4 the title to the land under water is to be forfeited unless the works are constructed upon it within fifteen years. As the land is not to be conveyed until the consent of Congress is obtained, the time of completion of the works is thus referred to the time of Congressional action.

From all these considerations, it seems entirely clear that the legislature did not intend that the grant should become effective to vest in the Company any control of the navigation of the St. Lawrence River, until Congress had, by special act, approved of the entire project, and had assumed complete control so far as the interests of navigation were involved.

II.

The Act of 1907 did not amount in legal effect to an attempt to grant to the Long Sault Company control of navigation.

(1) The Long Sault Development Company could never have obtained under the Act of 1907 control of navigation,

because the state would have had no such control itself after Congress had acted, and therefore, as a matter of law, cannot be deemed to have made an attempt to grant it.

We have already pointed out in what manner and to what extent the Federal Government had asserted its paramount control of the navigation of the river, by the River and Harbor Acts of 1892 and 1899, the Dam Act of 1906, and the treaties of 1842 and 1871. We have also shown that the express terms and conditions of the Act of 1907 paraphrase the Federal legislation on the subject and indicate complete acquiescence by the state in Federal control. It further appears that the state did not by the act of 1907 attempt to reserve to itself, either by implication or other wise, any control of navigation or the right to determine how much surplus water would be available for power purposes; and, of course, if it had, the reservation would have been subject to the superior power of the Federal Government to modify or annul it. There is nothing in the Act of 1907, therefore, from which it can reasonably be inferred that it was anticipated that, after the Federal Government had acted, there would remain in the hands of the state *any* control of navigation upon which the grant criticised by Chief Judge BARTLETT could operate. On the contrary, under the principle of the decision in the *Knoxville Water Company vs. Knoxville*, 200 U. S., 22, 34, the presumption would be to the contrary.

The provisions of the acts of Congress of 1899 and of 1906 clearly contemplate that where structures are erected under the authority thereby given, the control of navigation, so far as it is affected by such structures, is to be vested in the United States. The act of 1906 provides that there shall be erected all structures which the Secretary of War and the Chief of Engineers "at any time may deem necessary in the interest of navigation in accordance with such plans as they may approve", and especially locks or "other structures for navigation purposes in connection with such dams"; and the right is reserved, if necessary, to the United States itself to construct locks "or any other structures for navigation purposes and at all times to control the said dam to the level of the pool caused by the said dam to such an extent as may be necessary to provide proper facilities for navigation."

It is well settled that where the Federal Government takes control under an act of Congress, the control extends to the entire navigation and to every structure that may affect it, whether in the channel or in shallow water, and is exclusive of any control by the state. The cases on this point are numerous and decisive.

Even before Congress had passed any act assuming control of the navigable rivers throughout the country, the paramount power, in its discretion, to assume such control was affirmed by this court. *Willson vs. Blackbird Creek Marsh Company*, 2 Peters, 245, and *Gilman vs. Philadelphia*, 3 Wallace, 713. The decisions in both these cases were rendered before Congress began to enact general legislation upon the subject. But it has been uniformly held, after Congress began to pass acts assuming control of navigable rivers, that such acts have (except perhaps, in the case of rivers lying wholly within a state to which we refer below) excluded conflicting action by the states.

In *Philadelphia Company vs. Stimson*, 223 U. S., page 605, the question arose under the attempt by the Secretary of War to establish harbor lines in the rivers in the vicinity of Pittsburg. It was claimed that changes in the bed of the river affected the power to assert control in regulating commerce, but the court refused to accept any such contention and said that the bed of the river

> "may vary and its banks may change, but the Federal power remains paramount over the stream, and this control *may not be defeated by the action of the State in restricting the public right of navigation within the river's ancient lines.* The public right of navigation follows the stream (Rolle's Abr., 390; *Carlisle vs. Graham*, L. R., 4 Ex., 361, 367, 368) and the authority of Congress goes with it. *When the State of Pennsylvania established harbor lines and thus undertook to regulate the rights of navigation, its action, however effective as between the State and the riparian proprietors, was necessarily subject to the paramount power of Congress. The state lines can be conceded no permanent force, as against the will of Congress, without substituting for its constitutional au-*

thority the supremacy of the State with respect to navigable waters."

"It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."

The case of *Union Bridge Company vs. United States*, 204 U. S., 364, is cited with approval by the court and this language is quoted from the opinion of the court (p. 400), viz. :

"* * * * It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. * * * In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, *even those created under the sanction of a State* * * *,"

In *Garrison vs. Greenleaf-Johnson Lumber Company*, 215 Fed. Rep., page 576, the question involved was whether the Secretary of War could, after having established a new harbor line in the Elizabeth River in the State of Virginia, and without compensation, require the removal of a wharf which had been located inside of a previously existing harbor line established by the Secretary of War, the Circuit Court of Appeals said (page 580) :

* * * "It cannot be doubted, however, that the Supreme Court of the United States in its later decisions has taken the larger view that under the constitution of the United States the control and development of all navigable streams remains in the federal government,

and that no rights can be acquired against it exce
under affirmative conferment of Congress, that t
harbor lines of the federal government designati
the limit of navigation are changeable at its discr
tion, and that all who build wharves or other struc
ures in, under, or over the water of navigable strea
take the risk of whatever Congress either directly
through the Secretary of War may see fit to do for t
promotion of navigation."

The decision in the same case on appeal, under the ti
of *Greenleaf Lumber Company vs. Garrison, supra*, is t
last expression of this court upon the subject. It w
sought by the appellant to establish the proposition th
a distinction was to be made between structures in a riv
which avail locally of its navigability, such as piers, etc., a
structures which may more extensively obstruct its navig
bility. But the court refused to recognize any such distinct
and further held that the power of the sovereign, wheth
state or national (p. 260),

" is perpetual—not exhausted by one exercise—and
privileges granted in public waters are subject to it; a
that the exercise of the power was not a taking
private property for a public use but 'the lawful e
ercise of a governmental power for the common good.

The court further said (page 263) :

" We have recognized that the States have a certa
control and management over the navigable strea
within their territory, *but subject to be superseded by t
interference of Congress.*"

In *United States vs. Chandler-Dunbar Water Power Co*
pany, 229 U. S., 53, the question arose where the paramou
right to take possession of navigable streams was asserted
the Federal Government against riparian owners. The cou
said (page 64) :

" So unfettered is this control of Congress over t
navigable streams of the country that its judgment

to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

* * * * * * *

(page 65) The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; *and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was conclusive.*"

And then the court, after considering the nature of such rights and the structures which may be erected by virtue thereof, proceeds (page 70):

* * * "But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river."

See also to the same effect *Scranton vs. Wheeler*, 179 U. S., 141; *Stockton vs. Baltimore N. Y. R. Co.*, 32 Fed. Rep., 9; *Lewis Blue Point Oyster Company vs. Briggs*, 229 U. S., 82.

The language of Mr. Justice BRADLEY in deciding the *Stockton* case is particularly apposite. He says (page 20):

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters

and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. *We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient.*"

Finally, Judge COLLIN in his dissenting opinion in the Court of Appeals, quite correctly summed up the law in its application to the present case as follows (R., p. 80), viz.:

"The act in this regard was, in effect, the grant of such land under the water as the structures approved and authorized by Congress should cover, and of the right to use such surplus water as navigation regulated and controlled by Congress should not require for a water power, the grant, however, to have and take no effect until Congress had acted in the matter. Whenever Congress acted in the matter, it drew and retained unto itself exclusive and paramount control over the navigation and waters of the river for that purpose. Thereafter and thereupon such control was vested exclusively in Congress, by virtue, not of the act, but of the authority delegated by the state through the Fed-

eral Constitution. Congress may alter or obliterate whatever the state had placed or caused to be placed in the river in aid or improvement of navigation or other public utility, and, as has been held by the courts of the United States, might remove or change whatever structures it might have authorized the corporation to construct, as the navigation from time to time, in its judgment, required (Union Bridge Co. v. United States, 204 U. S., 364; Escanaba Company v. Chicago, 107 U. S., 678; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S., 349). The act did not authorize a grant of the soil or a use of the waters of the river in derogation of the right of the state to control them for the purpose of navigation. It did not, as of course it could not, affect the power of Congress over them."

It is clear from the principle of the foregoing authorities that if Congress should act upon the project for building a dam for the creation of a water power under the Long Sault Act, it would also have the power, to the exclusion of both the Long Sault Development Company and the State of New York, to take complete control of the navigation of the river under the new conditions; and the assertion of this control would not exhaust its power to require changes to be made at any time in the future or to make such regulations or restrictions as to the use of the waters of the river as it might from time to time deem advisable for the improvement of navigation.

It is hardly conceivable that the National government would assume only a *partial* control of the river. The magnitude and importance of the work would make it practically certain, and the analysis of the act made above clearly shows that the New York legislature anticipated, that Congress would not be satisfied without *complete* control. It might, perhaps, happen that in some minor respects, under the proposed special act of Congress, the control of the State and of the National government would become concurrent. *Huse vs. Glover, supra,* is an illustration of such a situation; and in *Cummings vs. Chicago,* 188 U. S., 410, and *Lake Shore Railway Co. vs. Ohio,* 165

U. S., 365, it was held that under the River and Harbor Acts then in effect, the Federal Government had not taken such exclusive possession of certain streams, *lying wholly within a state*, as to exclude the concurrent jurisdiction of the State in relation to the erection, in the *Cummings* case, of a dock, and, in the *Lake Shore* case, of a bridge. Congress in authorizing the Long Sault project might, as in these cases, leave to the state the power to exercise some independent authority in connection with some local aids to commerce along the shores of the slack water lake created by the dam. But such a thing would be improbable, because where the Federal Government does assert its power to take control of a great international river, the presumption would rather be that such control would extend to the entire river, from shore to shore, irrespective of the depth of the water. In *Greenleaf Lumber Company vs. Garrison*, *supra*, this court said that "when Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed" (See also *Scranton vs. Wheeler*, *supra*).

It would be absurd to say that in the improvement of such a great waterway as the St. Lawrence River, involving works of probably unprecedented size and power, and involving engineering problems of great difficulty, the State, in making the whole project conditional upon the approval of Congress and the Federal Government, can be deemed by implication, and without some unmistakable provision in the act itself, to have made a futile attempt to reserve to its grantee control of any particular part of the navigation of the river. The whole subject was necessarily, and with repeated evidences of an intelligent appreciation of the paramount character of the Federal power, referred to Congress for the exercise of its discretion; and the only thing expressly reserved to the state was the participation by it in the revenues to be derived from the sale of power, even the surplus water available for that purpose being necessarily to be determined by the Federal Government.

In this connection it is proper to call attention to the recent policy of the Executive Department of the Federal Government concerning the use of navigable rivers for water powers;

for it has not potentially alone, but actually and effectively, deprived the States of practically all control even in relation to that matter. We can do no better on this point than to call to the attention of the court a statement made by Senator Nelson in the debate in the Senate on February 16, 1916, upon a pending bill to amend the Dam Act of 1906, in which he called attention to a letter written on March 18, 1908, by President Roosevelt, in which the latter said that he would veto any water power bill unless, (1) it contained a limitation of time, and, (2) provided for the payment of a royalty or toll to the U. S. Government. Since that time Senator Nelson said there had been "an embargo upon the construction of dams over navigable waters in this country." In Appendix F hereto attached, we submit copies of Senator Nelson's statement and President Roosevelt's letter. They may be found in the Congressional Record of February 16, 1916, at pages 3049 and 3050.

It would thus appear that from a date shortly after the Long Sault act was passed it has been the continuous policy of the Federal Government to control navigation affected by dam projects, and one school of conservationists, including the responsible head of the Executive Department, has persistently asserted that that government has the right, hitherto supposed to be vested exclusively in the states, to enjoy the beneficial use for power purposes of all surplus waters not needed for navigation.

If the Federal Government should, by establishing harbor lines, leave to the State the right to regulate the erection of piers or other structures in the slack water lake produced by the erection of the dam, a transfer by the state to the Long Sault Company of the right to use such facilities of commerce and such surplus waters would not constitute such an irrevocable grant as, (1), to prevent the Federal Government, in the interest of the preservation or improvement of navigation, from directing the removal of such structures (*Garrison vs. Greenleaf Lumber Company, supra*), or, (2) render the state, in the words of Chief Justice BARTLETT, "powerless to act either directly or by constraint upon the corporation"; nor would it constitute an "abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private

corporation." Neither the state nor the national government would in such a situation have parted, as Judge BARTLETT said, "for all time" with the "power to improve such navigation."

Judge BARTLETT'S sweeping statements concerning the effect of the act of 1907 require some further comment:

By Section 3 of the Act the right is granted to the Long Sault Company to erect and operate dams, canals, reservoirs, sluices, trunks, pipes, bulkheads, piers, flumes, abutments "and other works appurtenant thereto as may be proper or useful for the purpose of the development of water power, and of electrical power and energy." * * * This grant is further amplified by the grant of power to erect and operate power houses, conductors, cables, wires, insulators and other appliances "in connection with the said works for the development of electrical power and energy" and in connection with all of these works to build bridges. Finally, the Company is empowered to use "the waters of said river at and above the points of location of said works." This grant broadly gives to the Company all those rights and powers necessary for the erection and operation of a power plant. It is somewhat significant that, in spite of the particularity with which the several structures are enumerated in this grant, they do not include the construction of a "lock or locks." These are the structures more directly than any of the others related to the maintenance and improvement of navigation, and it is noticeable that their location, construction and operation are made dependent upon the requirements of "the United States of America," and "of any act of the Congress of the United States relating thereto," as if to emphasize the intention of the state that the care of navigation should be relegated in the most absolute way to the Federal Government.

But if the intention of the legislature to put under the control of the Federal Government all structures which might affect the navigability of the river, is so clear, why, it may be asked, did the state assume to grant to the Company the right to construct a "dam or dams" and "other works appurtenant thereto?" The explanation is not difficult:

(*a*) The state owned the land under water, and so far as

any dam was " proper or useful for the purpose of the development of water power " and was not related to the preservation or improvement of navigation, the consent of the state to its erection was absolutely necessary. Further than that, the provision for the transfer of the land under water avoided any such question as arose in *Stockton vs. Baltimore, N. Y. R. Co.* and *Lewis Blue Point Oyster Co. vs. Briggs, supra,* where it was held that the title to land under water was held in subjection to the power of the Federal Government to place structures thereon for the improvement of navigation.

(*b*) The position of the dam " was to be selected by said corporation." The State itself was interested as a partner of the corporation, and as the corporation was to bear the expense of the improvement, it was not an extraordinary business risk for the state to delegate to the Company the power to select the site of the dam, particularly as it could presume that the Federal Government would not permit any unscientific or unwise selection to be made.

(*c*) If the State itself had been willing to undertake the work of improving the river, it would have had the right, under the principle of the *Kaukauna* case, to enjoy the use of the surplus waters after the needs of navigation had been provided for. It cannot be disputed that it might likewise, in consideration of a private corporation agreeing to do the work, transfer to such corporation an interest in the usufruct of the surplus waters. The provision of Section 3 granting the right " to take and use the waters of said river at and above the points of location " cannot reasonably be held to constitute anything more than a transfer of such an interest.

(*d*) The legislature after referring the whole matter of navigation to the Federal Goverment took the pains at the end of the sentence to add that the rights granted should " *never be so used as to impair or obstruct the navigation of the St. Lawrence river, but, on the contrary, that such navigation shall be preserved in as good condition as, if not better than, same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time.*" This cannot be regarded as having any significance *unfavorable* to the validity of the grant. It would be absurd to construe a sentence in which the whole

subject of the control of navigation was thus referred to Congress and to the Federal Government, as meaning that the legislature contemplated that a residuum of such control still resided in it in its sovereign capacity and that intended to divest itself of the illusory thing. And yet that is where the conclusion of the Court of Appeals must logically bring us.

(*e*) A few words are made necessary by the particularity with which the legislature has authorized the erection of the numerous structures mentioned in Section 3, to-wit, "dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant thereto," also "power house or power houses and conductors, cables, wires, insulators, and other appliances," and finally "a bridge or bridges * * * with the approaches thereto." If the legislature has, among all the numerous structures thus mentioned, indicated some as to which the power of the Federal Government is exclusive, that cannot, in view of the clear purpose not to exercise a jurisdiction in conflict with the United States, be reasonably held to outweigh the specific conditions, repeatedly imposed in subsequent parts of the act, that the entire project, whether as a power project or as a project for the improvement of navigation, was to be, so far as any structure whatsoever was concerned, dependent upon Congressional action. Even if such structures as "bulkheads" and "piers" might tend to obstruct navigation, and might, therefore, under the River and Harbor Act of 1899, be subject to the control of the Federal Government, yet if the Federal Government consented to their erection, or, by fixing a Harbor Line, left the whole matter to the State, the complete control of all such local aids to commerce would rest exclusively in the State, and especially since the State owned the land under water; and a transfer of the right to erect and maintain them would be clearly within the power of the State.

In *Cummings vs. Chicago*, 188 U. S., 410, the court said at page 430:

> "* * * But we will not at this time make any declaration of opinion as to the full scope of this power (*i. e.*, the power to regulate commerce among the states) or as to the extent to which Congress may go in the

matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several states. Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the states. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the *concurrent or joint assent of both the National Government and the state government.* The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. *But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies.*"

In *Cardwell vs. Bridge Company*, 113 U. S., pages 205, 210, it is said:

"These cases illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States; *and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action.*"

In *Lake Shore and Michigan Southern Railway Company vs. Ohio*, 165 U. S., 365, where an Ohio corporation was ordered to remove a bridge erected by the consent of the state, it was contended that the River and Harbor Act of 1890

was an express assumption by Congress of entire control over all and every navigable stream, whether or not situated within a state. The court said (p. 369):

> "* * * The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction. It follows, therefore, that, even conceding *arguendo* that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, *but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.*"

(*f*) Finally, a sufficient reason for the comprehensive grant made by the act of 1907 is to be found in the desire of the state, in authorizing an improvement deemed to be for the interests of the entire people of the state, to withdraw at the outset any possible objection that might, in any view of the law as to the respective rights of the state and national governments, be asserted by it, or which, either by reason of the state's ownership of the land under water or for any other reason, might embarrass the Federal Government in dealing with the subject. A similar situation was dealt with by Justice BRAD-

LEY in *Stockton vs. Baltimore & N. Y. R. Co., supra.* He asserted that the power of Congress was supreme over the whole subject "unimpeded and unembarrassed by state lines or state laws * * * and that state interests, state jealousies, and state prejudices do not require to be consulted"; and then the justice proceeded to use the following language which may be clearly applied to the case at bar, (p. 17), viz.:

> "* * * So where, in any case, Congress may have authorized the construction of a railroad or a bridge upon the condition of obtaining the consent of the state, it is clear that such consent was not required for the purpose of supplementing the power of congress to authorize the structure to be made, *but rather for the purpose of manifesting a disposition of comity and goodwill towards the state. For, if congress had not the power to authorize the structure, consent could not give it.*"

Finally, assuming that the State had any power in respect of navigation (and we repeat that any such power was largely theoretical) independently of the Federal government, it did not by the act of 1907, preclude itself, before Congress had acted, from doing anything that might be necessary for its protection.

Judge COLLIN quite correctly said on this subject (Record, p. 79):

> "Until Congress had acted in the matter, the state had unbounded and unrestricted right to exercise and effectuate its judgments in improving the navigability. * * * The act did not to any extent impede or shackle the state. * * * The state remained, in so far as the act was concerned, as free and powerful to work its will, in the public interest, in regard to the river and its navigation as it was before the act was passed or would have been in its absence. There was no provision in the act which stayed the hand of the state pending the action of Congress in the matter or which directly or through reasonable implication fettered or withdrew, or turned over to the corporation, to any extent or in any

particular the control held by the state, at the passage of the act, of navigation or the waters desired therefor."

See, also, *Chicago, Burlington and Quincey Railroad Company vs. Drainage Commissioners*, 200 U. S., 561, and *West Chicago Railroad vs. Chicago* (201 U. S., 506).

In *People vs. N. Y. & S. I. F. Co.*, 68 N. Y., 71, it was said (p. 79):

"The grant to Gore contained no words excluding the exercise, by the State, of governmental control of the waters above the land granted, as a public highway, and if, in exercising this control, the grantee is restricted in the use of his property, it is not in contravention of the grant, but consistent with it, because the grant, by well-settled words of construction, was subject to the exercise of this right and attribute of sovereignty."

III.

If there were a doubt as to the intent of the legislature or the legal effect of the grant the court should adopt an interpretation which would bring the grant within the power of the state.

Where a company erected a plant under a grant by a municipal corporation and a question arose as to whether the municipality was prevented thereby from establishing a system of waterworks of its own, this court said in *Knoxville Water Company vs. Knoxville, supra* (p. 34):

"The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

And Judge COLLIN says that the legislature intended to preserve navigation, and quite correctly adds (Record, p. 79):

> "* * * The Courts cannot impute to the legislature dishonest or undisclosed intentions or designs contradictory of those expressed. If the act can be upheld upon any view of public expediency, we must assume such view was legislative, and not annul it. * * * There was no language in it (the act) which would have branded as illegal, immoral or unfair whatever actions concerning navigation on the state might have taken. The control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention on the part of the legislature to that end."

And further (Record p. 78):

> "* * * It has an exclusive right to make the grant, and it is to be presumed that it emanated from a high sense of public duty, to promote the public welfare, and to establish the public prosperity. * * * Interference with navigation is a question of public expediency and advantage, and its determination is for the discretion and judgment of state and federal legislatures and not for the courts, which may not meddle or intervene unless and until the legislature plainly transgresses against the representative character of the technical title vested in it by virtue of its sovereign entity and bestows grants wholly unwarranted to common usufruct."

The Judge then says that a water power is a public benefit like many other improvements which the legislature may permit to be erected, and that the relative importance of the varying interests or commerce, trade and navigation must be determined by the legislature.

The principle thus expressed should apply with peculiar force in construing a grant by a State affecting the navigation of a great international stream.

In *Huse vs. Glover*, 15 Fed. Rep., 292, affirmed in 119 U. S., 543, it was said that the locks and dams constructed by the state did not aid navigation but were an impediment. But the Court held that the state was the agency which was to determine what promoted navigation, and *that its decision was final so long as Congress did not interfere.*

See *Pennsylvania vs. Wheeling Bridge Co.*, 13 How., 518, and compare it with the same case reported in 18 How., 421; also the *Chandler-Dunbar* case, *supra.*

In *Hazen vs. Essex Co.*, 12 Cush., 475, the Supreme Court of Massachusetts, speaking of an act authorized the building of a dam, said (p. 477):

> "* * * The declared purposes are, to improve the navigation of Merrimack River, and to create a large mill-power for mechanical and manufacturing purposes. In general, whether a particular structure, as a bridge, or a lock, or canal or road, is for the public use, is a question for the legislature, and which may be presumed to have been correctly decided by them" (Citing *Commonwealth vs. Breed*, 4 Pick, 463).

So the Court of Appeals should have assumed that the state had, through its legislature, reached a conclusion that the dam which was authorized would not obstruct navigation; and, furthermore, that, by repeatedly making the whole project subject to the consent of Congress and of the Federal authorities, it had, as we have shown, made it impossible that the interests of navigation should suffer.

IV.

A further evidence that the legislature did not intend to grant to an illegal extent its control of navigation is afforded by Chapter 452 of the Laws of 1913, by which the legislature attempted to destroy the rights granted to the Long Sault Company. Instead of merely repealing the act of 1907, the legislature adopted the unusual course of stating spe-

cifically the four grounds for the repeal, all of which related to the *legality* of the act of 1907. While the Court of Appeals has held that Section 4 of the Act, providing that "the enumeration in this act of the grounds for such appeal shall not be deemed to qualify or impair the full force and effect of the repeal" rendered the repeal effective, even though the four grounds specifically stated in Section 1 were untenable, yet obviously the legislature *attempted* to enumerate *all* of the grounds which they were advised rendered the Act of 1907 illegal; *and it did not specify the ground on which the Court of Appeals found the act to be void.* The Act was asserted to be in violation of the State Constitution (1) because, by a private or local bill, it granted to a private corporation an "exclusive privilege, or immunity, or franchise;" (2) because it provided for the transfer by the state of lands under water constituting a part of the Forest Reserve, and (3) because the act, being a private or local bill, embraced more than one subject, and that that subject must be expressed in the title of the Act. The fourth ground of alleged illegality was "that the said act is invalid as being in excess of the powers of the legislature, in that it attempted to provide for the alienation by the state to the said Long Sault Development Company of title to the land in the bed of the St. Lawrence river. The title of the state in those lands is a sovereign right rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation."

As we have already said, the ground upon which the Court of Appeals based its decision, to-wit, that the act was an attempt by the legislature to turn over to a private corporation the control of navigation and to abdicate in favor of such corporation, its own power to improve such navigation, *is not mentioned among the causes which moved the legislature to repeal the act of 1907.*

The omission of the statement of this as a ground of repeal is a significant indication that the legislature in 1913 did not think that it had by the Act of 1907 attempted to grant to a private corporation such control of navigation of the river as to render the grant void.

THIRD POINT.

The grant by the Act of 1907 of the property rights and franchises constituted, when accepted, a contract between the state and the Long Sault Company which was within the protection of the Federal Constitution.

If it is held that Chapter 355 of the Laws of 1907 was a valid exercise of the legislative power, so far as it made a transfer of rights necessary for the construction and maintenance of the dam for water-power purposes, we take it that the act constituted, upon acceptance by the company, a contract between the corporation and the state, and that the property rights acquired by the Company under the contract, are within the protection of Article I, Section 10, of the Federal Constitution under the principle of *Dartmouth College vs. Woodward*, 4 Wheat., 518. It is also plain that in that case any attempt to take from the Company such rights without compensation would be a violation of the Fourteenth Amendment of the Constitution in that it would deprive the Company of property without due process of law. If the grant did confer upon the Company contract or property rights, it will probably not be seriously contended that they could be lawfully destroyed or substantially impaired by the repealing act, Chapter 452, of the Laws of 1913, even though that act is effective to deprive the Long Sault Company of its right to exist as a corporate body. This principle has been finally settled in the State of New York by the decision of the Court of Appeals in *People vs. O'Brien*, 111 N. Y., 1. The principle of that case has more than once been approved by the Supreme Court, and particularly when questions have arisen under the corporation laws of the State of New York, where the courts have gone further than in some other states in holding that special franchises are not destroyed by the termination of the corporate franchise.

A.

The expressions in the prevailing opinions of the Appellate Division of the Supreme Court and of the Court of Appeals ought to remove the above questions from controversy in this court.

In the Appellate Division, the Presiding Judge said (Record page 43):

> "Assuming then that the act of incorporation in question was at least in its main features constitutional and that mandamus was a proper remedy of both the appellate company and the relator, the question then arises as to what if any change has been created by the repealing act. In discussing this question it will be further assumed that while the legislature under its reserved power has the right to dissolve the corporation it has not the right to confiscate its franchises. This was determined in People v. O'Brien, *et al.*, 111 N. Y. 1."

In the prevailing opinion of the Court of Appeals, Chief Judge BARTLETT, referring to Chapter 452 of the Laws of 1913, said (R., p. 69):

> "* * * The repeal, however, could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed (People v. O'Brien, 111 N. Y., 1). We are, therefore, called upon to consider and determine whether the legislature possessed the constitutional power to convey away the state control over the the navigation of the St. Lawrence river to the extent attempted by the act of 1907."

Thus it was decided in effect that the legislature had attempted to transfer something which was in the nature of rights and privileges of a character quite distinct from the right of the Long Sault Company to exist as a corporate body.

This interpretation, by the highest court of the state, of the terms and effect of Chapter 355 of the Laws of 1907, should

be accepted by this court as final upon this point (*Tampa Water Works vs. Tampa*, 199 U. S., 241; *Gelpcke vs. Dubuque*, 1 Wall., 175; *Smiley vs. Kansas*, 196 U. S., 447-55); and especially since such interpretation is in the nature of an admission against interest by a department of the state government as to the nature of rights arising out of a legislative act. It is peculiarly appropriate that, under such circumstances, a determination of a state court should not be re-examined in this court.

B.

A further discussion of this subject will throw light on the question whether the franchises granted by the act of 1907 would become vested on acceptance.

The principle applicable to this question is simple, but its application to concrete cases has often been attended with difficulty; and the line of demarcation between legislative acts which have created property rights within the protection of the Constitution and those which are subject to repeal, has sometimes been obscure. The general principle is announced by Judge Dillon in his work on Municipal Corporations (1 Dillon, Municipal Corporations, 5th Edition, Section 112), as follows, viz.:

> "* * * As to private corporations it can, we think, safely be affirmed that while the legislature may, under and pursuant to such reserved (*i. e.*, in the Constitution or the laws of a state) power, annul and dissolve them at pleasure, it is not within its competency, under the Federal Constitution as amended, or under like provisions in the Constitutions of the States, to impair or affect the property or property rights of the dissolved corporation, but only its *right to exist*, and such other rights as are *directly and necessarily dependent* on the continued existence of the corporation. The rights of mortgagees, or creditors generally, and rights arising under valid contracts with the corporation survive, the repeal and dissolution."

In *St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company*, 139 U. S., 1, the rights of the Northern Pacific Railroad Company derived from an Act of Congress authorizing it to construct a transcontinental railroad, were under consideration. The act granted to the company certain sections of land to be fixed by the company along the proposed route, which were subject to forfeiture in the event that it failed to complete the road within the time fixed by the act. The particular sections were not at the date of the grant ascertained or ascertainable. The St. Paul and Pacific Railroad Company, before the Northern Pacific Railroad Company had designated sections of land along the line of its route, claimed to have acquired rights under a subsequent act of Congress; and the question in this court arose upon the conflicting claims of the two companies. It was held that the right of the Northern Pacific Railroad Company under its grant was superior to that of the St. Paul Company upon the grounds which sufficiently appear in the following extract from the opinion of the court (page 5), viz.:

> "As seen by the terms of the third section of the Act, the grant is one *in praesenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. * * *
>
> "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route."

The *Northern Pacific* grant was like the Long Sault grant in the following features, viz: (1) Neither grant imposed an absolute obligation upon the grantee, but only *authorized* it to

construct the work " for the purpose of aiding in its construction ; " (2) in both cases the grants were dependent upon the performance of projected work not yet definitely planned; (3) the grant of land in the one case and the grant of the water power privilege in the other were the compensation paid for the performance of a public work ; and (4) the purpose in the Northern Pacific case was the building of a railroad for the development of the vast unoccupied tracts of the country and the prospective increase in the value of lands retained by the government and in the Long Sault case was the improvement of navigation and the development of a water-power with pecuniary profit to the state and the general commercial advantage of its citizens.

The decision in the *Northern Pacific* case was not made to rest upon the fact that the company had proceeded to expend the money in the construction of the road ; but, on the contrary, it was held that the purpose of the act was that the grant should become immediately effective, since it was contemplated that from the capital thus made available by a sale or mortgage of the lands, the company would be enabled to construct the road. In the Long Sault case, the grant to the company was obviously made with a view to induce the company not only ultimately to erect the proposed works, but also to incur the preliminary expense incident to such an extensive project ; and the immediate use of the special franchise was necessary in order to obtain financial support.

Excepting, therefore, that the company was not authorized to proceed with the work until it had obtained the consent of Congress, the principle of the *Northern Pacific* case seems to be directly in point to establish the right *in praesenti* of the Long Sault Company to erect the dam and to receive a transfer of land under water, subject only to the condition subsequent that it should obtain the consent of Congress.

This court has recently considered the principle under discussion in the case of *New York Electric Lines Company vs. Empire City Subway Company*, 235 U. S., 179. The New York Electric Lines Company had received from the Common Council of the City of New York the right to lay its wires in the streets of the city, but had not for many years availed of the right. Subsequently it sought to assert the right against a company which had been given the franchise to lay wires in

the street. It was conceded by the court that a grant of the kind made to the first grantee "*becomes effective when made and accepted in accordance with the statute and the grantee is thus protected in starting the enterprise* * * *" (page 194). It is also said by the court (page 193):

> * * * "These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities,—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge*, 3 Wall., 51, 74; *Pearsall v. Great Northern Railway*, 161 U. S., 646, 663, 667. *They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance.*"

The right which was being dealt with in the *N. Y. Electric Lines Co.* case related to the use of the public streets of the city by a private corporation, and the interest of the city was only that which resulted from its general obligation to all of the citizens. In the case of the grant to the Long Sault Company while the public right of navigation was involved, the state had in addition a proprietary interest based upon its right to utilize, for its own profit, the surplus waters of the river; and the transaction thus partook of the character of a

private contract even more than in the *Electric Lines Company* case, where the grant was for the benefit of individual consumers and the direct pecuniary profit was to be enjoyed not by the city but by a private corporation (See also *Russell vs. Sebastian, supra, Owensboro vs. Cumberland Telephone Company*, 230 U. S., 58).

Greenwood vs. Union Freight Railroad Company, 105 U. S., 13, is one of the cases in which this court has decided that the repeal by a state legislature of the corporate charter of a street railroad company under a provision of the legislature reserving the power to amend or repeal the same "at the pleasure of the legislature", had the effect to destroy its property franchises. The question arose between the Marginal Company, whose charter was repealed, and another company which was subsequently organized with the right to use the same streets for a railroad that had been occupied under its charter by the Marginal Company for the same purpose. It may be said, in connection with this case, that the court based its decision upon the peculiarly comprehensive character of the power reserved by the legislature to repeal the charter, and that it was probably also influenced by the public policy of the state of Massachusetts which differs from that prevailing in many other states. Upon this point the court said: "This expression (referring to the clause reserving power to repeal), 'the pleasure of the legislature', is significant, and is not found in many of the similar statutes in other states." Justice MILLER, delivering the opinion of this court, continued (page 19):

> "If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the City, and no longer exercise the franchise of running a railroad in the City. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights."

We note in passing, that the court in the *Greenwood* case laid stress upon the fact that the right granted to the Marginal

Company could not be enjoyed by "unincorporated private persons" under the general laws of the state. This cannot be said to be the case in New York, as we have shown above, concerning such rights and franchises as are granted by the Long Sault charter. Furthermore, even if that were not the case the *Greenwood* case appears to be in conflict with the decision of the Court of Appeals of New York in the *O'Brien case*, which has been approved by this court in the *Detroit Railroad Case*, 184 U. S., 368-395; and it is to be reconciled with the decisions in these cases only by assuming that the court was led to its conclusion by the peculiarly comprehensive phraseology of the clause of the statute reserving the right of repeal.

The principle under consideration has been considered by this court in a number of other cases, and particularly in connection with grants conferring upon railroad companies rights to locate and build railroads. It has been, for instance, decided that, under the General Railroad Laws of New York, no contract arises when, under the usual provision, a railroad company merely *locates* a route. It has been said that "there is no property in a naked railroad route existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation;" and, also, that the capacity to acquire land by condemnation conferred upon railroads by the General Railroad Law, does not constitute a franchise in the nature of property or confer a vested right which will survive the corporate franchise created under the terms of the law (*Adirondack Railway Company vs. New York*, 176 U. S., 335). The same principle was decided in the *Underground Railroad Company vs. New York*, 193 U. S., 416, where it was said that "the privilege of being a corporation did not carry with it the right to occupy any street of New York with its proposed railroad." In *Ramapo Water Company vs. New York*, 236 U. S., 579, the principle was applied to a water company which claimed that by filing a map covering 1,000 square miles, the company would acquire the right prior to the right of New York City under a subsequent act, to ac-

quire the water supply to furnish the city with water, and the court said (page 584):

> * * * "it would require stronger language than any that is found in the act of 1895 to lead us to believe that the legislature meant that the rights conferred with regard to routes should be extended over any or all of the water sheds in the State of which the plaintiff might see fit to file a map. The direction to file a map of the route adopted and the land to be taken, coupled with the other provisions that we have recited, appears to us to have in view the route and the land needed for the route, and only that, not the thousand square miles that the plaintiff claims."

And the court refused to find that the company had the right "unlimited in time, to exclude the rest of the world from whatever watersheds it chose, simply by filing a map."

But no further reference to cases of this kind is necessary, since they are obviously not applicable to the grant of rights and franchises to erect at a particular locality a profit producing plant like a water power dam.

In the case of *People vs. O'Brien*, 111 N. Y., 1, the legislature passed a repealing act dissolving the Broadway Surface Railway Company, and it was held to be constitutional, but only so far as it deprived the company of the right to exist as a corporation. The court held that the special franchise which had been granted to the corporation to maintain tracks and operate cars on Broadway, survived the repealing act, being a property right created by contract with the state, and protected by the provisions of the Federal Constitution. The court said (page 36):

> * * * "Whatever might have been the intention of the Legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution, * * * but we think that there are no reported cases in which the judgment of the court has

ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal * * *."

The question under consideration has frequently led to a discussion as to the difference between a general and a special franchise. This received the attention of the Court of Appeals in *Lord vs. Equitable Life Assurance Society*, 194 N. Y., 212, where the court said (page 225) :

> * * * "The charter of a corporation is the law which gives it existence as such. That is its general franchise, which can be repealed at the will of the legislature. A special franchise is the right granted by the public to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of the city. *Such a franchise, when acted upon, becomes property and cannot be repealed, unless the power to do so is reserved in the grant, although it may be condemned upon making compensation.*"

(At page 226) :

> * * * "The right to be a corporation, or the corporate right of life, is inseparable from the corporation itself. It is a part of it and cannot be sold or assigned. That franchise is general and dies with the corporation, for it cannot survive dissolution or repeal. *On the other hand, grants to do something in the public streets or special franchises are not a part of the corporation. They can be made to an individual with the same legal force or effect as to a corporation. Unless there is some legislative restriction they can be mortgaged and sold. They are no part of corporate life, if owned by a corporation, any more than they are a part of individual life if owned by a human being.*"
>
> See also *Shield vs. Ohio*, 95 U. S., 319.

In *Rochester Turnpike Company vs. Joel*, 41 App. Div., 43, an act depriving a turnpike corporation of the right to charge

toll from bicyclists was held unconstitutional. The court said, per ADAMS, J., at page 52:

> * * * "whether the plaintiff's franchise be regarded as in the nature of a contract, or simply as property, the attempt on the part of the Legislature to interfere therewith was an invalid exercise of power; for in the one case its necessary effect was to impair a contract, while in the other its tendency was to deprive the plaintiff of its property rights without due process of law, and in either case it was a violation of clearly defined constitutional limitations."

The court referred to *Monongahela Navigation Co. vs. U. S.*, in which it was held, at page 344, that a franchise to exact tolls for improved facilities of navigation was as much a vested right as the ownership of tangible property.

In the case of *Rochester Water Company vs. City of Rochester*, 176 N. Y., 36, the Rochester Water Power Company had been organized with power to lay its pipes across certain streets in the City of Rochester for the purpose of furnishing neighboring villages with water. Subsequently an act was passed providing that no water pipes should be laid in the streets of the city without the consent of certain officials and that all rights granted to corporations contrary to the provisions of the act were repealed. It was held that the right acquired by the plaintiff company was vested and could not be destroyed by the legislature. An injunction was granted restraining the officers of the city from interfering with the laying of the water pipes.

The principle of the above cases was applied to a case involving rights in lands under the waters of navigable rivers in the well-known case of *Langdon vs. The Mayor*, already referred to, where the owner of adjoining uplands obtained from the state a grant of lands under water in the North River for use as a wharf, in consideration of certain payments and a covenant to maintain the wharf in good condition. Subsequently the City of New York sought to construct further out in the river a new bulkhead which would have destroyed the right of access to the plaintiff's wharf over the waters of the harbor. It was held that the plaintiff had acquired a permanent right to the

lands under the waters for the purpose of the wharf and an easement over the waters owned by the city adjoining the wharf which were necessary to obtain access thereto.

The court, by EARL, J., said (p. 156) :

> " If the grant to Astor had been made directly by the legislature, or by the commissioners of the land office, under its authority, it would have been inviolable as a contract within the protection of the Federal Constitution, the obligation of which no legislative act could impair (*Fletcher v. Peck*, 6 Cranch., 136). It matters not that the grant would limit the power of the State in the exercise of its sovereignty over the public waters, and would so far limit and control future legislatures. The same is true of all grants by the State of any part of the public domain. When valid grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation.
>
> " It is a general rule that the legislature cannot pass an irrepealable law, but there are some exceptions. *Whenever legislative acts are in substance contracts between the State and the party who is to derive some right or benefit under them, then such contracts are not the less under the protection of the Federal Constitution, because they have assumed the form of acts.* It is a part of the sovereign right of the State to regulate the construction of highways, bridges, ferries and railroads for the promotion of travel and commerce, and yet the legislature can, except as prohibited by Constitutions, pass an irrepealable act, granting the exclusive right to bridge a navigable stream, or to maintain a ferry over navigable water, or to build and maintain a turnpike or railroad upon a certain route. (*Charles River Bridge v. Warren Bridge, supra ; Richmond, etc., Railroad Co. v. Louisa. R. R. Co.*, 13 How (U. S.), 71 ; *Binghamton Bridge*, 3 Wall., 51.) "

It will be perceived that the distinction between what may be called for convenient reference, a " general franchise,"—by

which is meant a franchise to exist as a corporation—and a "special franchise,"—by which is meant a franchise based upon a property or contract right which may not be destroyed without compensation,—is much more sharply drawn under the decisions in New York State than in some other states; and that the New York courts have always been inclined to hold that *property* or *special* franchises exist independently, and are not generally an essential feature, of a grant of *corporate* franchises.

C.

There is nothing in the character of the property to which the special franchises granted by the act of 1907 related, which made it necessary that they should be enjoyed only by that Company, or that they should be dependent upon the continued existence of that Company.

The right to build dams and operate water-power plants need not be exercised by any particular kind of corporation. Nor is it the kind of a right, as was said in the *Greenwood case, supra,* "which could not be exercised by unincorporated private persons under the general laws of the state." On the contrary, the first section of the Long Sault act shows that the corporation was intended to be nothing more than agent of or contractor for the State in a public business enterprise which was to make profitable use of the dormant water power. This fact cannot be changed by the mere magnitude of the project or the difficulty of the financial and engineering problems involved. Numerous instances cited above indicate that it had long been the custom of the State of New York to grant both to individuals, and to corporations organized under its corporation laws, the right to build dams across navigable streams and to enjoy the exclusive benefit to be derived from the water power thus created; and an examination of these instances will show that in far the larger number of such cases the grant has been made to individuals. The water power privilege is not essentially different from the right to take tolls for the use of bridges over navigable streams, or of turnpikes, or of improved facilities in navigable rivers. In all such cases public property held by the state in its sovereign capacity is turned over to private corporations and used by

them for profit, and generally without sharing it with the state. Lands under the waters of navigable rivers, ferry facilities, docks, wharves and basins constructed upon lands belonging to the state, are a similar kind of property and are frequently granted by the State. That in this class of property is to be included the right to use the surplus waters of a navigable stream was decided in the *Kaukauna* case.

In this connection Chief Judge RUGER'S definition in the *O'Brien* case of special franchises is pertinent. He describes such franchises as being

> " those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, and not to those which are in their nature purely incorporeal and inalienable, *such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges.* The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made."

The result of the application of this test to the Long Sault grant is obvious. The right to maintain a dam and develop power, is a right relating to the use of physical agencies and corporeal property. It is not dependent upon any power which has been usually or historically regarded in the State of New York as so inextricably connected with the corporate life as to become extinct upon the death of the corporation; and this view has received the sanction of the courts whenever the question has arisen.

D.

There are conclusive indications from the provisions of the Act of 1907 that the legislature intended that the special franchises should not be dependent upon the continued existence of the corporate franchise.

(*a*) By Section 5 of the Act of 1907, the Long Sault Company was given the power to " sell or convey all or any por-

tion of its property and assets, and the *franchises and rights appurtenant thereto*, upon such terms as may be consented to as aforesaid, but subject always to all the conditions and provisions of this act." A power is thus given which would enable the company to sell and transfer to any person, corporation or copartnership the right to erect the dam and to enjoy the water power, and the provision granting it is wholly inconsistent with an intention that the special franchise should be held only so long as the Company should retain its corporate existence.

(*b*) There is no provision in the act that the Long Sault Company was to cease to exist upon making a transfer of its "franchises and rights appurtenant thereto." On the contrary, by Section 6, its existence is made perpetual; and it might, therefore, continue to exist for years after it had transferred its property to another corporation by voluntary deed. It can hardly be said that it was intended that when it finally did cease to exist its death would defeat the title of a purchaser to which it had long before conveyed its title; and Section 10 of the act is repugnant to any such conclusion, for it provides that "this act, and all the terms, conditions and provisions thereof, shall apply to the *successors* and *assigns*" of the incorporators.

(*c*) Section 5 permits the transfer of "*any portion*" of the franchises. The corporation would thus be entitled to transfer to one individual or corporation its right to sell power, to another its right to maintain a toll bridge and to a third the privilege of using the power developed for the "manufacturing of commodities."

(*d*) By Section 2, Subd. (6) of the act the Company is authorized to "mortgage its property and franchises" in order to secure its obligations. It is thus necessarily authorized to assign to its creditors an interest in its special franchises, and, in case of default and foreclosure, the franchises would, of course be transferred to a purchaser. The circumstance that a similar authority had been vested in the Broadway Surface Railroad Company by its charter led the Court of Appeals in the *O'Brien* case to say that it could not "be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their

consent." The Court also referred to the policy of the State of New York in respect of permitting railroad corporations to deal with their property by making leases, mortgages, consolidations, etc., and stated that it was a matter of common knowledge that many railroads of the state were being operated by companies other than those to which the special franchises had been originally granted. The court finally summed up on this point by saying that it was a "general policy of the state to render such interests independent of the life of the original corporation and transferable as property by means of judicial proceedings and otherwise. * * *"

The court added:

> "If it is possible to conceive the idea of a repealable grant, certainly such a grant accompanied with power to convey or pledge the interest granted, must on the execution of the power necessarily preclude a resumption by the grantor of the subject of the grant or any right or property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law and *it is equally clear that any legislation which authorized such a result to be accomplished indirectly would be equally ineffectual and void.*"

The conclusions thus expressed as to the Broadway franchises would follow *a fortiori* in the case of the franchises granted by the Long Sault charter, because of the specific and comprehensive provisions it contains permitting the Company, not only to mortgage, but also to make an absolute transfer of its franchises or any portion thereof. A different conclusion would involve an assumption that the state has granted valuable special franchises with the express power to transfer or mortgage them, and has at the same time reserved the right to defeat the transfer or mortgage by cancelling the contract at any time. It would perhaps have been *possible* to make a grant so contradictory in terms, but every canon of construction would require that conditions so qualifying a grant should be expressed in unmistakable terms.

Upon this point what Mr. Justice BRADLEY says in the dissenting opinion in the *Sinking Fund Cases*, 99 U. S., 700, in

referring to the *O'Brien* case, is particularly pertinent. He said (p. 749):

> * * * "The reserved power in question is simply that of legislation,—to alter, amend, or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract, or to alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable."

FOURTH POINT.

The special franchises were subject to acceptance by the Long Sault Company immediately upon the passage of the Act of 1907. They were accepted, and such acceptance is still effective.

Acceptance is, of course, essential to the validity of special franchises; but the form which it may take varies with the character of the franchise. The only question on this head which is really arguable is whether, on account of the nature of the grant, there was any act on the part of the company which could, before the consent of Congress was obtained, have constituted an acceptance.

A.

The franchise was subject to acceptance immediately upon the passage of the act; and such acceptance has resulted from acts of the company and of the State officials which were, under the terms of the Act of 1907, intended to constitute such acceptance.

The Long Sault grant was executory in that something had to be done by the Company before the franchise granted

could be enjoyed in possession, *but this was an infirmity inherent in the nature of the franchise, for the state itself would not have been able to exercise it until it had obtained the consent of Congress.* That the state did, by the act of incorporation, employ the Long Sault Company as its agent or substitute or contractor, to take the steps necessary to get the consent of Congress, is too clear for controversy. In connection with a similar delegation of power by the Federal Government, Judge BRADLEY in *Stockton vs. Baltimore and New York R. Co., supra,* said (p. 15) that

> "* * * if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself or a state corporation already existing and concerned in the enterprise."

In *Garrison vs. Greenleaf Johnson Lumber Company, supra,* in commenting upon the Monongahela case, this court said (p. 266) :

> "It (the Monongahela Navigation Company) * * * constructed a public work, having no other power to do so but the authority conferred upon it by the state and by Congress—invited, indeed, to do so, and given as its compensation a right to take tolls for the use of the works. This court well said that such right was as much the consideration of the service rendered as the material property constructed."

Not only was the Long Sault Company employed by the State to take the steps preparatory to a great public work, but it was required, years before the work could possibly be finished, annually to pay a considerable sum. This was undoubtedly required not only as an evidence of the good faith and of financial responsibility, but also as compensation for the supposed benefits to be derived by the Company from what was in the nature of a preemptive right to avail itself of valuable franchises.

The payments referred to were to be in addition to any organization or corporation tax required to be paid by the

general laws of the State. Fifteen thousand dollars were to be and was paid for the year 1910, and Twenty thousand dollars for the year 1911; and these and all other payments were recited in the act to be made "in consideration of the conveyance so made under the authority of this act, *as well as for the rights and privileges hereby granted*" (Record, p. 24). For each year after 1911 the annual amount to be paid by the Company was fixed at certain "rates upon the average amount of electrical horse power generated during such year," but it was provided by the Fourth section of the act that the amount payable was never to be "less than $25,000."

The payment of the minimum amounts fixed by the act was not conditioned upon the authority of Congress having first been obtained; and it is, therefore, manifest that they were to be paid to bind the contract; and the act itself thus prescribed what was to constitute an acceptance of the franchise.

In *Underground Railroad Company vs. New York, supra*, the plaintiff sought to establish its right to construct the railroad upon the route which it had designated by showing that it had paid an incorporation tax of one-eighth of one per cent. on its capital stock as required by a State statute, but the court said (p. 430), that "the payment of a tax for the privilege of being a corporation did not carry with it the right to occupy any street of New York with its proposed railroad". It further claimed that its payment of the ordinary taxes assessed against it by the city, county and state of New York, constituted an estoppel and that neither the city, county nor state could deny that it possessed the franchises which it claimed; but the court commenting upon this payment said that the company had not paid any tax "*on the right to construct a railroad in the streets of New York.*" While by Section 7 of the act of 1907 provision was made for the payment of an organization tax—a tax, of course, to be paid but once—the payment of the *annual* amount was to be made "in consideration of the conveyance so made * * * *as well as for the rights and privileges hereby granted*". It is to be noted also that Section 4 which provided for the annual payments was the section which dealt exclusively with the grant of the land under water, the conveyance of the rights and franchises specifically described in Section 3 and the other terms of the

acts which related to the partnership arrangement between the Company and the State as to the sharing profits of the water power plant.

From all these considerations it seems clear that the legislature intended that the annual payments provided for in Section 4 were to be received by the State as compensation for the present grant of property rights.

In addition to making the annual payments the Company has proceeded to make diligent efforts to procure the consent of the Federal Government and to do everything else that could be done in preparing to avail of the rights and franchises granted; and these have been precisely the kind of things which the state itself would have had to do if it had undertaken the project. The Company has made plans at a large expense; it has purchased four thousand acres of land; it has acquired riparian rights; it has expended for all of these purposes more than the sum of $750,000. Everything of which the situation was susceptible has been done to indicate to the state that the grant has been accepted. Clearly, reciprocal obligations have arisen between the Company and the State.

In *Russell vs. Sebastian, supra*, the question of the acceptance of a franchise to lay pipes in the city of Los Angeles was raised. The Company had made a large investment in its plant and had laid its pipes in some streets. Its plant had been built in contemplation of extending the pipes into additional streets, and the claim was made that in respect of such streets there had not been an acceptance by the grantee of the franchise to use them Such acceptance it was claimed could only be made by actually taking possession of the streets, but the court said as to this claim (page 208):

> "* * * But this is to say that the offer as made could not be accepted at all; that the right to *lay* pipes could not in any event be acquired. It is to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants—in the construction of reservoirs, and in the building of manufacturing works—was invited without any assurance that the laying of the distributing system could be completed, or that it could even be extended far enough to

afford any chance of profit. *It would be to deny the right offered, although essential to the efficacy of the enterprise, and in its place to give a restricted and inadequate right, which was unexpressed.*

"In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no grounds for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted."

The same principle was applied in *People ex rel. Woodhaven Gas Co. vs. Deehan*, 153 N. Y., 528, cited by Mr. Justice HUGHES in the *Sebastian* case (See, also, *Owensboro vs. Cumberland Telephone Co.*, 230 U. S., 58.

In *Fletcher vs. Peck*, 6 Cranch., 87, it was sought to set aside a conveyance of public lands made pursuant to an act of the legislature of the state of Georgia, and upon the general principles applying to such a situation, Chief Justice MARSHALL said (p. 136):

"A contract is a compact between two or more parties and is either executory or executed. * * * A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and it implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law an-

nulling conveyances between individuals, and declaring that the grantors stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."

Two instances may be mentioned of contracts between the City of New York and private corporations, which are familiar under the system of dealing with such matters in the State of New York. They are pertinent in this connection:

(1) The franchise to build a street railway is made dependent, by the law of the State of New York, upon the obtaining of the consent of a certain portion of the property owners along the proposed line of road, or, failing in this, on the making of an order of the Appellate Division of the Supreme Court finding a public necessity for the building of the line. There is no support in the State of New York for the doctrine that either the state or the municipality could, after the proper public officials have granted the right to build the line, revoke the franchise before the consent of the property owners or a decision of the Appellate Division has been obtained. It is always assumed that between the time of the grant by a municipal government of the right to construct a street railroad, and the obtaining of the necessary consents, the franchise, for a reasonable time, continues in force. If this were not so, no public enterprise requiring private capital would ever be undertaken.

(2) Most of the water-front titles around the City of New York have been derived under old acts of the legislature, by which an upland owner was given the right to build a pier or a bulkhead upon paying a certain portion of the expense, and, as a consideration, was granted the right in perpetuity to enjoy the wharfage or a part of the wharfage accruing at the pier or bulkhead. The history and character of these grants and the legal rights springing from them are fully examined in *Langdon vs. The Mayor, supra.* Most of the grants were by deed and purported to convey the right to use public property, to wit, land under water, which had been previously transferred to the city by the state, either by old city charters or by legislative acts. The value of such grants to the

city has been due entirely to the condition subsequent, which required the grantees to fill in the land under water and construct piers and bulkheads ; and, of course, they had no value to the grantees until the conditions subsequent had been performed. It would be regarded in the State of New York as absurd to say that between the date of such grant and the full performance of the conditions subsequent, the city could, without compensating the grantee, step in and resume the title to the property. We make this statement, of course with the qualification which may, perhaps, be made necessary by the decision of this Court in *Greenleaf Lumber Company vs. Garrison, supra*, that title conveyed by such a grant might be subject to be defeated, in the event that paramount interests of navigation asserted by the Federal Government should require it.

Both of these instances illustrate principles well recognized in the jurisprudence of the State of New York, and are not to be distinguished in principle from the contract created by the Long Sault Act of 1907, since they both equally relate, as Judge RUGER said in the *O'Brien* case to the kind of "corporeal property" used by "railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges."

In further support of this conclusion we refer to several cases decided in the State of New York.

In *Matter of Long Acre Power Company*, 117 App. Div., 80, a writ of mandamus was sought by the Long Acre Company to compel the Consolidated Telegraph Subways Company to allow it to lay its wires in the subway conduits of the latter company in the City of New York. The defense was that the Long Acre Company had no valid franchise. Permission to lay electric cables in the streets of the city had been granted to the American Electric Manufacturing Company by the municipal authorities in 1887. Shortly afterwards that company assigned the franchise to an individual, who in turn assigned it to the Long Acre Company, which exercised the franchise in the city for some time without question, until it sought to use the subway conduits of the Consolidated Company.

" The Court says, by SCOTT, J., page 85 :

> " * * * What was granted to the manufacturing company was the right to do certain things. That right constituted its special franchise, and was property."

The Court, further held that the franchise to lay the wires was distinct from the franchise to be a corporation, and that, although there had been in the grant no express authority to assign the franchise, there was no legal objection to such assignment. On appeal to the Court of Appeals (188 N. Y., 361), the right of the corporation to exercise the franchise was sustained, the Court saying (p. 366) :

> * * * " It cannot be disputed that a franchise to operate electrical conductors in the streets is property, taxable, alienable, subject to levy and sale under execution and to condemnation under the exercise of the power of eminent domain."

In *People ex rel. Woodhaven Gas Co. vs. Deehan, supra*, a corporation obtained a franchise from the town of Jamaica to lay pipes in the streets of the town for lighting purposes. The town authorities refused to permit the corporation to lay pipes in certain streets. It was held by the court that a franchise had been created which was property and which could not be destroyed or rendered useless by the act of the town authorities.

> See, also, *Ives vs. South Buffalo Railway Co.*, 201 N. Y., 271.

It cannot fairly be argued that the grant was invalid for uncertainty or indefiniteness, in that it did not specifically provide a time within which the approval of the United States government was to be obtained. There is no sound reason why the contract should not have applied to it the same rule as that governing a contract between individuals (*Fletcher vs. Peck, supra*). And this would require that a condition should be implied that a reasonable time would be allowed to obtain the consent of the United States government. There is nothing in the record to show that the consent of

Congress could have been obtained before the attack upon the Company's charter began, and, as we show in C below, the state officials did not believe that it could have been. In view of what we have already said about the rigid attitude of the Federal Government with reference to permits to build dams under the Dam Act of 1906, it can hardly be said that the Long Sault Company has been guilty of *laches* in failing up to this time to procure the passage of an act of Congress permitting the building of the dam.

B.

It does not lie with the state to terminate the contract obligations it has incurred by returning the moneys already paid by the company.

Section 2 of Chapter 452 of the Laws of 1913 directs the repayment to the corporation of the moneys paid in accordance with the requirements of the Act of 1907. This is an attempt to treat the obligations created by the act as terminable at the election of the state. But a forfeiture of contractual or property rights protected by the Federal Constitution, cannot be effected in any such summary manner (See *People vs. O'Brien, supra, Rochester Turnpike Co. vs. Joel*, 41 App. Div., 43, and *Colby vs. Equitable Trust Co.*, 124 App. Div. 262–266). The payments by the Long Sault Development Company in 1910 and 1911, which were received without protest by the state, in addition to the other steps taken by the Company in the effort to avail of the franchise at a total cost of $750,000, constituted a consideration for the grant amounting to acceptance, which the state cannot now annul by an offer of repayment. As was stated by Chief Judge CULLEN in *Heerwagen vs. Crosstown Street Railway Company*, 179 N. Y., 99, at page 103, in considering the effect of payments made by the Street railroad corporation for its franchise:

> "The payments the defendant agreed to make were the consideration of the acquisition of valuable property rights which would survive its corporate existence and possess all the ordinary attributes of property."

C.

The repealing act cannot effect a forfeiture of the rights of the Long Sault Company on the ground that the Company has failed for an unreasonably long time to avail of them.

As late as March 29, 1912, the New York Senate adopted resolutions (Record, p. 18) which recited that the Company *is proceeding* "to secure the consent of the governments of the United States and of the Dominion of Canada." The Attorney General of the State was requested by the resolutions to render his opinion upon the constitutionality of the act and to advise, in case he reached the conclusion that it was unconstitutional, "what if any present action or proceeding may be brought by the state to ascertain judicially such fact." On December 30, 1912, he submitted his opinion to the effect that the act was unconstitutional (Record, p. 19), and stated four grounds for his opinion, all of which were adopted by the legislature and specified in the repealing act. Thereupon the legislature passed the repealing act. But there is no intimation that the legislature believed the repealing act to be justified because of a failure on the part of the company, for an unreasonable length of time, to avail itself of the grant.

It is quite obvious from the peculiar phraseology of the repealing act that the legislature intended to state specifically all grounds known to it for the claim that the charter was void. The omission to specify *laches* is significant, if not conclusive. Indeed, the recital in the repealing act that the company is proceeding to get the consents of the American and Canadian governments indicates that the legislature believed that the company was proceeding with so much expedition that prompt action was necessary to defeat its purpose. Finally, the provision contained in the repealing act that the Company should be compensated for its loss, and that the amounts paid by it should be reimbursed, cannot be reconciled with a belief on the part of the legislature that there had been a default on the part of the company which constituted a breach of the obligations assumed by it under the provision of the charter.

If now we turn to the action of the executive officers of the State we shall find confirmation of the above conclusion

from the attitude of another branch of the state government. In January, 1911, the Company, pursuant to the provisions of the act, tendered to the State Treasurer the sum of $15,000, and in January, 1912, the sum of $20,000, those being the amounts payable for the years 1910 and 1911, respectively. The State Treasurer accepted these payments and did not object on the ground that the Company was not diligently proceeding to obtain the consent of the Federal Government. Again, in January, 1913, the Company tendered to the State Treasurer the $25,000, the amount due for the year 1912, and that official, on the advice of the Attorney General of the State, refused to accept the amount, solely upon the ground, as he specifically stated (Record, p. 29), that he could not receive them because, under the advice of the Attorney General, the charter of the Long Sault Development Company was unconstitutional. Thus, in January, 1912, the state was clearly estopped from asserting that an unreasonable length of time had elapsed; and the failure a year later to make a similar objection adds to the strength of the presumption, fairly to be drawn, that the rights of the Company had not been lost by the lapse of time.

Finally it has not been suggested in any opinion, either prevailing or dissenting, either in the Appellate Division or in the Court of Appeals, that the rights and franchises of the Long Sault Company had been lost through an unreasonable delay in availing of them. On the contrary in the prevailing opinion of the Appellate Division it is said that the company "at the time of the instituting of these proceedings was still endeavoring to obtain the consent of Congress to its project, but had not succeeded."

FIFTH POINT.

The decision of the Court of Appeals cannot be sustained on any proposition of State law decided by it and which is exclusively within its jurisdiction. The decision below should, therefore, be reversed.

A peculiar situation is presented by the opinions which have been expressed in this case by judges of the Appellate Division and the Court of Appeals. The Appellate Division consisted of five judges and all of them agreed (Record, page 40) that the four reasons put forward by the Attorney General for his opinion that the act of 1907 was unconstitutional, were not tenable. Three of the judges, however,—and against a reasoned opinion concurred in by the remaining two—construed Chapters 452 and 453 of the Laws of 1913 as constituting a taking of the Long Sault Company's property under the right of eminent domain. It thus appears, that if the acts of 1913 had not been passed, the decision of the Appellate Division must have been unanimously in favor of the plaintiff in error.

In the Court of Appeals Chief Judge BARTLETT, writing the opinion of the court, gave no consideration to any of the points which had been dealt with in either the prevailing or dissenting opinion of the Appellate Division, but based his conclusion upon the single ground that the State attempted by the act of 1907 to grant control of the navigation, and that it was without power to do so. This point had not been mentioned in the opinion of any judge or of the Attorney General, or in the recitals contained in the repealing act. The dissenting opinion of Judge COLLIN sustained all of the contentions of the plaintiff in error.

It thus appears that there has been a wide divergence of view among the twelve judges who have examined the numerous questions of State and Federal constitutional law involved in this case. But the validity of the act of 1907 under the State Constitution and laws has been affirmed by six judges, three well reasoned opinions being written in which

that result was reached. No judge who has considered the case has sustained any of the four contentions of the Attorney General which were recited by the legislature as grounds for the repeal. Under these circumstances we think we are fairly entitled to claim that if this court should hold that the Act of 1907 constituted a contract between the State and the plaintiff in error, the obligations of which are within the protection of the Federal Constitution, there is no question of state law decided by the Court of Appeals upon which the judgment below can be sustained.

On the other point dealt with below, to wit, the effect of Chapters 452 and 453 of the Laws of 1913, three judges of the Appellate Division reached the conclusion that those acts constituted a taking under the right of eminent domain. Three judges, that is, the two dissenting Appellate Division judges and Judge COLLIN in the Court of Appeals, reached a conclusion to the contrary. Chief Judge BARTLETT, representing the majority of the Court of Appeals did not consider the subject at all; *but the conclusion which he arrived at is necessarily inconsistent with the view of an attempted exercise of the right of eminent domain.* He held that the attempted grant to the plaintiff in error by the act of 1907, was void; and, if that conclusion is correct, obviously the legislature could not have intended to acquire the rights of the Company by condemnation, nor, indeed, would they have had the power to repossess themselves of that the title to which they had never lost. It follows, therefore, that Judge BARTLETT and the five judges who concurred in his opinion (R., p. 86), must have reached the conclusion that the acts of 1913 did not constitute a taking of the property of the Company under the right of eminent domain.

Upon such a record as this, this Court should not assume that grounds for the decision of the Court of Appeals exist other than those stated by the court itself; and it should not, therefore, hesitate, if it reaches the conclusion that the act of 1907 did confer upon the company contract rights, to reverse the judgment.

It would, perhaps, be sufficient to rest upon the situation thus created; but lest this Court should entertain a doubt upon the subject, we have deemed it advisable, at the risk of extending this brief to a length which it would be desirable

to avoid, to repeat the argument presented by us to the Court of Appeals upon all of the points which had been urged against the validity of the act of 1907 by the Attorney General and the legislature.

We shall also deal with the propriety of the remedy by mandamus; and in that connection it is proper to call to the attention of the court the fact that by implication, if not by express statement, the state court has held that the writ of mandamus was suitable in the circumstances, and that its issuance would, if our contentions were legally sound, be a proper exercise of the judicial discretion.

It seems to be the settled practice that this court will examine the record and consider all the points involved, but only for the purpose of determining whether there is any ground on which the judgment could stand which was decided by the State Court and which was exclusively within its jurisdiction.

In the case of *Murdock vs. City of Memphis*, 20 Wall., 590, the whole subject of the jurisdiction of the court was elaborately considered by Mr, Justice MILLER, under the provisions of Section 709 of the Revised Statutes as amended in 1867. He said (p. 635):

> "But when we find that the State court has decided the Federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record *actually decided by the State court* which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court.
>
> "But this examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such *have been*

decided, and their sufficiency to maintain the final judgment, as decided by the State court."

To the same effect are the decisions in

McLoughlin vs. Fowler, 154 U. S., 663.
Osborne vs. Florida, 164 U. S., 650, 656.

This rule announced in *Murdock vs. Memphis, supra*, is applicable to all the remaining points.

SIXTH POINT.

Chapters 452 and 453 of the Laws of 1913 do not constitute an authorization for the taking by right of eminent domain of the special franchises of the Long Sault Company. Regarded as an attempt to condemn such franchises they would be unconstitutional (1), because they do not provide for "just compensation," as required by Article 1, Section 6, of the State Constitution, (2) because they would deprive the Company of its property without "due process of law," in violation of the Fourteenth Amendment of the Federal Constitution, and (3) because they impair the obligation of the contract between the State and the Company in violation of Article 1, Section 10 of the Federal Constitution.

Since the rights of the plaintiff in error are based upon a contract with the State, this court, under the rule established by the decisions cited in the First Point, if it considers the proposition stated above to be still open, should finally dispose of them, even if that requires an interpretation of State law.

Chapter 452 enacts that Chapter 355 of the Laws of 1907 is "hereby repealed, *upon the following grounds:*" Then

follow the four grounds claimed to render the act unconstitutional. Such a statement of judicial grounds for legislative action is so unprecedented that it is proper to give it especial significance in seeking the legislative intent.

Section 2 authorizes the *repayment* of a specific sum to the Company, viz: the aggregate amount which the Company had theretofore paid into the said treasury with interest.

Section 4 provides that "the enumeration in this act of the grounds for such *repeal* shall not be deemed to qualify or impair the full force and effect of the *repeal.*"

There is thus in Chapter 452 no suggestion of condemnation and for the obvious reason that the Legislature deemed and asserted the act of 1907 to be unconstitutional, and that, therefore, it was only necessary to repeal it in order to destroy the objectionable franchises, and that was the course advised by the Attorney General. The claim that there has been a condemnation, however, is based upon the theory that Chapters 452 and 453 taken together authorize acquisition by the State under the right of eminent domain.

Chapter 453 confers jurisdiction upon the Court of Claims to hear and determine the "alleged claims, *if any*" which may be presented by the Company against the State "by reason of the *repeal*" of the Act of 1907. The jurisdiction of the court is strictly limited to claims thus caused. It is provided that:

> "* * * No award shall be made on any such claims against the state except upon such legal evidence as would establish a liability against an individual or corporation in a court of law or equity."

and

> "Nothing herein contained shall be regarded as *conceding the validity* of any such alleged claims"

nor

> "as waiving on behalf of the state any *defense* thereto."

What is the legal effect of this unusual legislation?

No *taking* of property is expressed or implied in the language used. The State undoubtedly had the *power* to con-

demn, but the question is whether it *intended* to condemn. If it had such intention the legislature has selected very inapt language to express it.

That which is awarded to the owner when his property is taken by condemnation in New York is usually called "compensation," not "damages," and the "liability" of the State and the legal evidence to establish it are not very aptly denoted by referring to what would be appropriate in a suit to recover a claim "against an individual or corporation in a court of law or equity". The explanation of the use of these terms is found in Section 264 of the New York Code of Civil Procedure where the jurisdiction of the Board of Claims is defined, viz.:

> "It also has jurisdiction to hear and determine a private claim against the state * * *.
>
> "In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except *upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity.*"

The words italicized correspond to those quoted above from Chapter 453, and particular significance, therefore, attaches to their use in the latter act. If the assumption that the Act of 1907 was unconstitutional had been correct, the provisions of Chapter 453 would be explainable as making provision for the allowance upon moral considerations of claims for damages; and claims based upon such considerations have been under like circumstances recognized in New York.

Chief Judge CULLEN in *Quayle vs. The State*, 192 N. Y., 47, decided in 1908, when Section 264 of the Code was substantially in the above form, said:

> * * * "There are cases in which the claims against the state rest not on legal, but on moral or equitable obligations which the State may recognize or refuse to recognize at pleasure. * * * The obligation against the state was an imperfect one, which being founded in right and justice, this court held the state could recognize and satisfy, but until recognized it had no legal force. Doubtless in cases of this character it

is necessary that there should be some statute expressly authorizing the Court of Claims to hear and adjudicate the claim, but in other cases the court has power, without special statute, to determine the validity of a claim unless it is of a character which by the terms of the Code is withdrawn from its jurisdiction."

Judge CULLEN cited *Cole vs. The State of New York*, 102 N. Y., 48, where the Court said (page 53):

> "We are unable to find in the Constitution any thing which deprives the legislature of the power of giving to the board of claims, or any other proper tribunal, jurisdiction to hear and determine claims against the State which are founded in right and justice, solely for the reason that they could not be enforced against an individual in the courts.
>
> * * * * * *
>
> (p. 54) "Where the creation of a particular class of liabilities is prohibited by the Constitution, it would of course be an infraction of that instrument to pass any law authorizing their enforcement, but in the absence of any such prohibition there is no good reason why the State should be powerless to do justice, or to recognize obligations which are meritorious and honorary and to provide tribunals to pass upon them. The legislative power is sufficient, even as between individuals, to afford new remedies and to create liabilities not before existing, where they are based upon general principles of justice" (See, also, *O'Hara vs. the State of N. Y.*, 112 N. Y., 146; *The Supervisors of Cayuga County vs. State of N. Y.*, 153 N. Y., 279.

A case of peculiar and exceptional hardship was presented to the legislature of 1913, for the exercise of the beneficent power recognized in the above decisions.

The Long Sault Company had proceeded on the faith of the Act of 1907 to spend in promoting the enterprise the sum of $750,000, a large part of which would be entirely lost by the repeal. The state authorities had yearly, and especially

during the years 1910 and 1911, given confirmation of the validity of its franchises, by receiving taxes and other amounts payable under the Charter. These facts gave a foundation for an equitable moral claim; and the direction in Chapter 452, to repay to the Company all amounts paid to the State Treasurer with interest, is a clear legislative recognition of the merit of a claim which was capable of liquidation, while the other claims of the same character had of necessity to be referred by Chapter 453 to the Court of Claims because they were unliquidated.

If we construe Chapter 452 as intended to effect an absolute repeal of the special franchises because they were unconstitutional and Chapter 453 as providing a method for ascertaining unliquidated, equitable claims, we shall give to the acts a meaning consistent with a purpose of the legislature to follow the advice of the Attorney General which it had solicited, and shall avoid a strained interpretation that it proceeded upon the highly improbable supposition that the four grounds of unconstitutionality stated by the Attorney General *might* prove to be insufficient, and that to meet that contingency condemnation proceedings should be provided for.

The Board of Claims is a court of limited jurisdiction, and the power to condemn cannot be vested in it by vague implication. The extent of the powers of the court are fully dealt with by Judge RODENBECK in *Taylor vs. State*, 124 N. Y. Supp., 818.

In *State vs. County of Kings, et al.*, 125 N. Y., 312, the defendant county contested the validity of an Act which imposed upon it a certain proportion of the State taxes. A further act was passed in 1884 authorizing and directing the Board of Claims to hear and determine the claims of the State for certain balances due upon the tax accounts from certain specified accounts. The Act did not in terms amend the acts creating the Board of Claims. The question of the jurisdiction of the Board came up sharply for the consideration of the Court. Speaking of the Act which made the reference to the Board of Claims, the Court said (p. 322):

> "But in reviewing the proceedings of the Board of Claims, we have been embarrassed, not only by the vagueness and uncertainty of the questions submitted,

but also by doubts as to the validity of the referring act itself. We do not question the fact that the Board of Claims is a constitutional tribunal, and is lawfully authorized to determine claims against the state which may have been referred to it, but it does not follow that the legislature can compel citizens to appear before it and litigate claims made by the state, or any other party against them. Such boards have usually originated out of the apparent injustice of depriving the citizens of all remedies against the state, through the inability of the regular judicial tribunals to acquire jurisdiction over the sovereign. Such jurisdiction can be obtained only by the consent of the sovereign (*People v. Dennison*, 84 N. Y., 281), and in giving such consent, the government may lawfully prescribe the terms and conditions upon which such prosecutions shall proceed and it may lawfully create a special tribunal for the hearing and determination of such exceptional cases as established courts are precluded by the general laws, or policy of the state, from hearing and deciding. The State may, to a certain extent, abandon its prerogative and consent to appear before a special tribunal (*McElrath v. United States*, 102 U. S., 440)."

See, also, *De Hart vs. Hatch*, 3 Hun, 375; *Alexander vs. Bennett*, 60 N. Y., 204; *Anderson vs. Reilly*, 66 N. Y., 189.

Bearing in mind these limitations upon the powers of the Board of Claims, can it reasonably be inferred that the legislature intended by referring in the conventional language of Section 264 of the Code to "the alleged claims, *if any*," of the Company, to provide for the *taking* by condemnation of special franchises lawfully vested in it?

We think this question must be answered in the negative for several reasons.

How and by whom could it be determined whether the Company is entitled to damages or compensation? Chapter 453 provides that the Board of Claims shall hear and determine "the alleged claims, *if any*, which may be presented" by the Company "by reason of the repeal." But it would be im-

possible for the Board of Claims to determine any such claims *until it had first determined whether they ever existed at all, or whether, if they did, they had been in a Constitutional manner terminated by the repeal.* It is in precisely such matters as these that the powers of the Board of Claims are narrowly restricted.

The Board in hearing the claims would not be at liberty to assume that they did exist, for the provisions of both Chapters 452 and 453 clearly imply that the State, in consenting to have damages awarded, did not concede that fact. It would become necessary, therefore, at the outset to make a determination as to what rights and franchises remained in the Long Sault Company after the legislation of 1913—*in other words judicially to consider and decide all the constitutional questions, both State and Federal, which have been and now are presented for decision.*

It is extremely doubtful whether the Board of Claims had the power, upon a theory of the constitutional rights of the Long Sault Company which that Company disputed, to adjudicate without its consent upon such rights, or, under such circumstances, to make or refuse to make an award as compensation for its property. For the Company would in that case be deprived of the right to resort to the Supreme Court, in which, before the repealing acts had been passed in 1913, it had chosen to commence this proceeding which was appropriate to determine such rights. And yet we must attribute to the legislature a purpose to accomplish precisely such results, if we are to assume that the two acts of 1913 were intended to provide for the acquisition under the right of eminent domain of the special franchises of the Long Sault Company.

We do not give much weight to the argument of the Appellate Division based on Section 4 of Chapter 452, providing that "the enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal." Full force may be given to this provision without twisting it to a support of a conclusion that a condemnation proceeding was in the view of the legislature.

It was also suggested by the Appellate Division (R., p. 44) that "the State has * * * adopted the same procedure as is adopted in condemnation of all land or property for canal purposes." The provisions relating to condemnation for canal

purposes, were contained in Chapter 147, Laws of 1903, and, as amended, are now a part of the Consolidated Laws (Vol. 1, pp. 521, 526, Sec. 4). The State Engineer is authorized to enter land proposed to be taken for canal purposes, and to make surveys, maps and descriptions, which on approval by the Commissioners, when duly certified by them and the surveyor, are to be filed in the office of the Commissioner of Public Works. Notice is thereupon to be served on the owner or, if that is not possible, service is to be made by filing notice with the County Clerk, and on filing such notice the "entry and appropriation" for the above purposes "shall be deemed complete." It is then provided that "the Court of Claims shall have jurisdiction to determine the amount of compensation for lands, structures and waters so appropriated." Thus, when the matter comes to the Court of Claims *the interest to be taken is precisely ascertained.* No question of title remains to be decided and the Court has nothing to do except to appraise the value of the property taken.

Under a principle generally applicable in condemnation proceedings the condemning party cannot raise any question as to the title of the property owner (*Lewis on Eminent Domain* (3d Ed., Sections 659-661). In other words the sovereign is supposed to ascertain what it needs, to describe it with precision and then proceed to take it; and having, by some due process, given everybody an opportunity to be heard before the appraisers as to compensation, to leave it to the courts having general law and equity jurisdiction to determine, in case of conflicting claims to an award, who is entitled to it. Where as in the present situation the condemning party—the State—is one of the claimants to the property, there is an added reason for the application of this rule; for it is an established principle that "in general a party cannot proceed to condemn land as the property of another and then in that same proceeding set up a paramount right or title in itself, either by prescription, dedication or otherwise."

Lewis on Em. Dom., § 660.
Village of Olean vs. Steyner, 135 N. Y., 341.
Matter of City of Yonkers, 117 N. Y., 564, 572.
Colo. M. R'y Co. vs. Croman, 16 Colo., 381, 384.
Matter of City of New Orleans, 20 La. Ann., 394.
S. F. & S. J. R. R. Co. vs. Mahoney, 29 Cal., 112.

In *Village of Olean vs. Steyner, et al.*, the Village attempted under its charter to acquire land for the purposes of a street. It claimed in the proceeding that the land had been dedicated by the owner to public use as a highway and that, therefore, the owner was not entitled to any compensation. Judge FINCH, delivering the opinion of the Court, said (p. 343):

> "I do not see how the village of Olean can raise the question of a dedication to the public use in this proceeding, for its very existence and prosecution *necessarily involves an admission of the landowner's right*, and an inquiry into his damages resulting from a necessary taking of that right."

The Court said that if the street had been dedicated the municipality was at liberty to open and maintain it and then proceeded,

> * * * "But the municipality waived any such claim, if it existed, by proceeding under the charter to condemn the landowner's right, and to assess his damages for what was proposed to be taken from him. Manifestly, the village conceded his right when it instituted a proceeding to take it away, and under a provision of the charter having no application except where there is an owner other than the village and whose title is to be divested. To say that there is not such owner, and that the easement sought to be condemned belongs to the municipal corporation by the act of the owner, is to deprive the proceeding of all foundation and invite its dismissal for that reason. The order cannot be sustained on such ground, for the charter does not authorize a taking of the fee, but only an easement for a village street, and precisely that easement had already passed if there had been a dedication and acceptance, and the municipality finds itself in the awkward position of seeking to condemn its own property for its own use. *The question thus necessarily becomes one, not of condemnation, but of title, and ends in the inquiry whether the village owns or does not own the easement, and that question cannot be raised or tried in a proceed-*

ing which assumes the landowner's conceded right, and is framed solely to ascertain his just compensation for parting with it."

In *Matter of the City of Yonkers*, 117 N. Y., 564, where the City attempted in a manner somewhat similar to that adopted in the *Village of Olean* case to defeat any claim to damages on the part of a property owner on the ground that the latter did not have title to the easement sought to be acquired, the court, by Judge PECKHAM, said (p. 572):

> "These proceedings are entirely inappropriate for the purpose of trying the question of title to the property in controversy, or for testing the right of the city to an easement in the land for the purpose of building the sewer referred to herein."

The Court then referred to certain proceedings by the City which assumed that the appellant was the owner of the land or easement in question and added:

> "* * * Not only the nature of the proceedings themselves, but this action of the commissioners, the council and the court, was all founded upon the assumption of the ownership of this right on the part of Mr. Lawrence, and that it was necessary to be taken for public purposes and to be paid for by the parties interested therein. Such a proceeding is not the proper one for the purpose of testing the title to the land which is proposed to be taken, as between the public body and the individual against whom the proceedings are commenced." * * *
>
> "If this were a public street at the point in question, then this is an entirely inappropriate proceeding to investigate any special damage that the land-owner of adjacent property may be subjected to by the digging up of the public street and laying the sewer therein by the public authorities. His property is not taken nor is any new easement therein taken from him, and, therefore, no necessity exists for the institution of any such proceeding, and its institution in a case where the city

denies the existence of any right or title in the assumed owner, is improper and should not be permitted."

In *Colorado M. R'y Co. vs. Croman*, 16 Colo., 381, a railroad company sought to condemn land and in the petition filed for that purpose set up title in fee in itself and asked that it be adjudicated. It was held such proceedure could not be followed and the Court said, page 384:

> "Appellant cannot be permitted in this proceeding to seek the condemnation of certain lands, and at the same time, and in the same suit, and in the same petition, set up a title in fee in itself, and ask an adjudication upon it."

To the same effect is *Matter of the City of New Orleans*, 20 La. Ann., 394.

If the Acts of 1913 constituted as claimed below a *taking* of the franchises by the State, they would themselves be like an entry upon the property. They would be like the ordinary petition in a condemnation proceeding; and the Board of Claims would be bound to construe them as saying "we are taking the special franchise of the Long Sault Company, and referring to you the question of damages or compensation, but take notice that on that question we shall contend that nothing shall be awarded, because we are the real owners of what we are seeking to condemn; and on that question involving delicate questions of Constitutional law we shall ask you to pass."

That is impossible under the cases just cited.

In connection with the provisions of the acts themselves, it is proper to consider some circumstances surrounding their enactment.

The Appellate Division refers to the message of the governor, of January 13, 1913, in which he urges the passage of the Repealing Acts, to his message vetoing the so-called Martha-Patrie Conservation Bill, to pending legislation on the subject of the conservation of the public resources, and to other matters outside the record, for the purpose of showing that they all affirmatively support the presumption that the

legislature in passing the Repealing Act was attempting to acquire for a public use the property of the Long Sault Company.

But there is not the slightest intimation in any of these messages or projects of legislation that the power of eminent domain was intended to be exercised by the State. On the contrary the Attorney General, the Governor, the Senate and the Assembly were agreed in stating that for the four reasons already referred to, the grant of powers to this corporation was unconstitutional and that *for that reason* the charter should be repealed.

In the resolutions of the Senate (R., p. 18), adopted in March, 1912, that body requested the Attorney General to advise them, first, as to the constitutionality of the Act constituting the Charter of the Long Sault Company, and second, if he was of the opinion that the Act was unconstitutional, "what if any present action or proceedings may be brought by the State to ascertain *judicially* such fact." On December 30th of the same year the Attorney General submitted his opinion (Appendix A) that, upon four grounds referred to, the Act was in violation of the State Constitution. He also advised that while the legislature had power to direct the Attorney General "to bring an action to procure a judgment vacating and annulling the Act of incorporation in case of fraud or concealment in procuring the passage of the Act," it was not clear that legal proceedings could be "maintained in the courts to determine the constitutionality." He advised, however, that it was competent for the legislature if it was of the opinion that the legislature which had passed the Long Sault Act had exceeded its constitutional powers, to pass an Act repealing that Act; and he cited cases where in similar cases the legislature had taken that action, referring particularly to the repeal under consideration in *Coxe vs. The State*, 144 N. Y., 396, and *Illinois Central Railroad Company vs. Illinois*, 146 U. S., 387. (See Reports of Attorney General, 1912, Vol. II, page 598.)

In his message of January 13, 1913, the Governor denounced the Act of incorporation as containing provisions which were "improvident, unwise and indefensible," and urged with vigor the reasons why franchises such as were granted to the Long Sault Company should not be enjoyed by a

private corporation, but the only *legislation* which he recommended was that the Charter should " be immediately repealed." He refers to the " careful and exhaustive consideration given to the subject by the Attorney General " and says he is " fully in accord with the able opinion of the Attorney General, which clearly demonstrates that said Act is unconstitutional and void " for the four reasons which the Governor proceeds to state in full. He then adds, " The Attorney General, the State Conservation Commission, and myself are convinced that this act *is void and unconstitutional, and that the appropriate action to be taken by the Legislature at this time is to repeal the said act*" (Public Papers of Governor Sulzer, 1913, p. 40. See also Appendix B).

It is impossible to spell out of these expressions of the legislative and executive departments an intention to proceed by condemnation. But it may be said that there is logical inconsistency in repealing a void Act. That course, however, the Attorney General, on precedent and as a matter of expediency, advised in preference to an attempt to have the question of constitutionality determined by the courts; and whatever may have been in the minds of the legislators, it is quite clear that the assumed unconstitutionality of the Act of 1907 was the most efficient cause moving them to repeal the Act. To impute to them a further legislative intent to authorize the payment of the State's money in the purchase of franchises stated in the Act to be void, involves a degree of logical and practical incongruity which cannot fairly be attributed to the legislature, in the absence of clear and unambiguous language; and such language cannot be found.

To sum up: The assertion by the legislature of the unconstitutionality of the Act of 1907, after having waited nearly a year for the Attorney-General's investigation of the law, and having on the ground of such unconstitutionality been urged by the Governor to act; the reference of the claims of the Company to a court of limited jurisdiction not authorized by the statute creating it to pass upon disputed questions of title, especially when they involve the validity, under both the State and Federal Constitutions, of acts of the legislature; the incongruity in the position of the State in asserting that there was nothing to condemn and then instituting a condemnation proceeding; and, finally, the inap-

propriateness of a condemnation proceeding as a means of determining title: all of these considerations point strongly to the conclusion that there was no intention on the part of the legislature by Chapters 452 and 453 of the Laws of 1913, to take by the power of eminent domain the special franchises granted by the Act of 1907.

B.

If, however, Chapters 452 and 453 of the Laws of 1913 be regarded as an attempt to acquire by right of eminent domain the special franchises, they are in violation of Article 1, Section 6, of the State Constitution, which provides that private property shall not be "taken for public use without just compensation," of the Fourteenth Amendment of the Federal Constitution, because the Company would be deprived of its property "without due process of law," and of Article I., Section 10, of the Federal Constitution, because they impair the obligation of the contract between the State and the Company.

The question as to whether the Act of 1907 conferred upon the Long Sault Company property rights was properly before the Supreme Court before Chapters 452 and 453 of the Laws of 1913, were passed, and the legislature was without power by passing those acts to deprive the Company of the right to a final determination in the proceeding then pending in that Court. An attempt to do so would be a violation of the Federal Constitution, first, because, for the reasons apparent from the foregoing discussion, the acts of 1913 deprived the Company of its property without due process of law because they did not furnish it with a tribunal vested with power to determine its rights, and, second, because for the same reasons the acts of 1913 impaired the obligations of the contract created by the act of 1907.

Article VI., Section 1 of the State Constitution provides as follows:

> "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or

may be prescribed by law not inconsistent with this article."

It has been repeatedly decided that the legislature has no power to deprive a citizen of the right to resort to the Supreme Court under the foregoing clause, or, when he had selected that Court in which to commence an action, to send him to any other tribunal; and that is especially true when, as in the case of the Board of Claims, that tribunal is a court of limited jurisdiction.

In *Taylor vs. The State (supra)*, a claim was made under the Canal law, which, as we have shown above, makes elaborate provision for proceedings upon the condemnation of property to be taken for canal purposes. Tenants of the claimant appeared and claimed to be entitled to a portion of the award. The Court, however, decided that it had not the power to determine the conflicting claims thus arising, or "to pass upon the amount of the tenant's interest after the owner had been made a party to the proceeding and given an opportunity to be heard."

The Court held that in spite of the broad language of the Canal Act, such questions could only be, under the State Constitution, determined by the Supreme Court under its "general jurisdiction in law and equity," and added (p. 821):

> "* * * This language forbids the transference of this jurisdiction to the other courts so as to restrict citizens in the right thus granted to them."

The Court then referred to the numerous authorities and continued:

> "* * * It would seem from these authorities that the Legislature has no power to create a court wherein suitors are compelled to try issues without consent which they have a constitutional right to try in the regular courts, and there is nothing in the act creating the Court of Claims which indicates an intention on the part of the Legislature to compel suitors to try issues between them in that court."

In *De Hart vs. Hatch, supra*, an act was under consideration which permitted the Supreme Court to transfer

actions pending therein to the Marine Court for trial. The act was declared to be unconstitutional and to be in violation of the provisions of the Constitution which provide that "there shall be a Supreme Court having general jurisdiction in law and equity." Judge DANIELS writing the opinion of the General Term of the First Department said at page 382:

> "The nature of the provision made by the legislature, is not changed by the circumstance that the election of the authority to transfer its causes, has been, in terms, given to the court. For the Constitution has not rendered the jurisdiction subject to any such election; and, as the legislature has no power by direct act to restrict that jurisdiction, it can not empower the court to do what it is without authority to do itself. * * * The act itself is equivalent to a refusal to hear and determine the cases which may be transferred. It must necessarily place them beyond the authority of the court making the transfer. To that extent, it involves a complete surrender or restriction of its own constitutional authority; for, after that, the court must cease to be a court having jurisdiction to hear and decide the cases transferred to another tribunal. * * * After the action has been once commenced, the defendant has the right to require that the case shall be heard and decided by the court, unless it may be voluntarily abandoned or dismissed by the act of the court itself. He, equally with the plaintiff, can insist that the jurisdiction provided by the Constitution shall be observed and maintained for the purpose of giving him a hearing, and adjudicating as to his rights."

To substantially the same effect is *Alexander vs. Bennett*, *supra*.

In *State vs. County of Kings*, already cited, the Court said

> "* * * but it does not follow that the legislature can compel citizens to appear before it and litigate claims made by the state, or any other party against them."

This language of the court applies to the present situation. The legislature could not attempt under the guise of making compensation, to compel the Long Sault Company to go into the Board of Claims and there, instead of in the Supreme Court where the proceeding was then pending, to try out the question as to whether it had any property rights at all.

Under the above authorities it seems clear that the legislature has failed to provide a constitutional method whereby "compensation" may be awarded to the Company. The acts are, therefore, in violation of Article I, Section 6 of the State Constitution, and of the provisions of the Federal Constitution already referred to.

SEVENTH POINT.

If regarded as an attempted exercise of the right of eminent domain, Chapters 452 and 453 of the laws of 1913 would be unconstitutional in that property sought to be acquired was not to be taken for public use.

The Fourteenth Amendment of the United States Constitution declares that:

> "No state shall * * * deprive any person of life, liberty, or property without due process of law, nor deny to any person, within its jurisdiction the equal protection of the laws."

The Constitution of the State provides, in Article I., Section 6:

> "No person shall be * * * deprived of life, liberty or property without due process of law; nor

> shall private property be taken for public use, without just compensation,"

and in Section 7,

> " When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, * * * or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

Within the meaning of the foregoing clauses the property rights sought to be condemned by the acts of 1913 were not being taken for a public use.

In the *Matter of Albany Street*, 11 Wend., 149, the Court said by SAVAGE, Ch. J., page 151:

> " The constitution, by authorizing the appropriation of private property to *public use*, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported."

The Appellate Division construed the contemplated use to which the property must be applied within the meaning of the Constitution to be an *actual and present use* in the contemplation of the State. But the sole declared reason for a *taking* by the acts of 1913 was that the act of 1907 was unconstitutional; and no public use was mentioned in the acts. If it be assumed, as we think it may be, that the Court may look into the surrounding circumstances to determine whether there was contemplated a public use, the Court will be obliged at least to conclude that such use was not definite or immediate; for there is nothing to indicate a plan of the State at any time to use the water power at the Long Sault Rapids or to develop plans therefor; and no appropriation had been made for that purpose. The Appellate Division seeks to find a purpose in excerpts from the Gover-

nor's messages and in legislative bills which failed of passage, indicating a general policy to conserve all such natural resources as water powers. We doubt if Governor Sulzer's motives can properly be imputed to the Legislature as a reason for its action, or as indicating its purpose that the property sought to be acquired by the repealing act was to be devoted to a "public use." But let the argument be carried as far as the Appellate Division pressed it, and it still remains the fact that the attempted appropriation of the property was without any design of *present* use and only with a view to *possible* development in the *future*. While such an appropriation may be for a "*public purpose*" as stated by the Court, it is not for such a "*public use*" as will justify the taking of property under the right of eminent domain.

In *Webster vs. Pole Line Co.*, 112 Md., 416, it is said at page 426:

> "'The expressions public interest and public use are not synonomous.'"

In *Matter of Niagara Falls Railroad Co.*, 108 N. Y., 375, it was held that the taking of private property to construct a scenic railway along the Niagara River was not for a public use, and the Court said by ANDREWS, J., page 385:

> "What is a public use is incapable of exact definition. The expressions '*public interest*' and '*public use*' are not synonymous."

The application of the words to any particular state of facts is a question for the judiciary. In the present instance the legislature has not expressly declared that the property is to be taken for a public use, but even where such declaration is made, the question whether that is the real purpose of the taking may be examined by the courts.

In *Pocantico Water Co. vs. Bird*, 130 N. Y., 249, HAIGHT, J., says at page 258:

> "* * * The question of public use is a judicial one and must be determined by the courts."

In *Lewis on Eminent Domain*, 3d Ed., Sec. 251, it is said :

> " All of the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary'

To the same effect, see :

Re Fowler, 53 N. Y., 60.
Matter of Deansville Cemetery Ass'n., 66 N. Y., 569.
Matter of Niagara Falls & Whirlpool R. R. Co., 108 N. Y., 375.
Waterloo Woolen Mfg. Co. vs. Shanahan, 128 N. Y., 345.
Matter of Tuthill, 163 N. Y., 133.
Bennett vs. Boyle, 40 Barb., 551.
Matter of Townsend, 39 N. Y., 171.

The use which is intended by the Constitution is referred to by the text writers. In *Lewis on Eminent Domain*, Sec. 600, p. 1060, it is said :

> " * * * we think that the Constitution impliedly forbids the taking for public use of what is not necessary for such use and, therefore, though the Constitution and statute are silent on the subject of necessity, that the power to take is, in every case, *limited to such and so much property as is necessary for the public use in question.*" * * *

In *Cooley on Constitutional Limitations*, 4th Ed., 674, it is said :

> " The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the *particular use for which the appropriation is made.* * * * The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain."

See also *Randolph on Em. Dom.*, Sec. 185.

In *Waterloo Woolen Mfg. Co. vs. Shanahan*, 128 N. Y., 345, O'BRIEN, J., says at page 357:

> "* * * there can be no dispute as to the power of the Legislature to take private property for other than a public use without the consent of the owner. That, of course, cannot be done, either with or without compensation. Nor can it be denied that, generally, whether the use to which private property may be devoted by legislative power is in fact public or private, is a judicial question, and the courts are not concluded by any declaration of the law-making power as to the nature of the use."

The Court of Claims held in *Ontario Knitting Co. vs. State*, 69 Misc. Rep., 145, affirmed 147 App. Div., 316, 205 N. Y., 409, that the State could not condemn land under the Barge Canal Act which was not necessary for use in connection with the construction of the canal. It was suggested in that case that the land in question, if taken by the State, would save it from future claims for damages due to the operation of the canal adjacent to the property in question. RODENBECK, J., referring to Article I., Sec. 6 of the Constitution, says:

> "This is a restriction upon the authority of the State itself to take property under its power of eminent domain. * * * Under its terms property can only be taken for public use. * * * 'If private property can be taken that is not necessary for public use, where will the line be drawn? Such a power would open a door for an easy evasion of the Constitution.'" * * *

In *People ex rel. Trombley vs. Humphrey*, 23 Mich., 471, an appropriation of private property for the purpose of conveying it to the United States Government for the erection of lighthouses thereon was held unconstitutional. COOLEY, J., at page 474, says:

> "The authority springs from no contract or arrangement between the government and the citizen whose property may be appropriated, but it has its founda-

tion in the imperative law of necessity." * * * "The right being thus found to rest upon necessity, the power to appropriate in any case must be justified and limited by the necessity. * * *"

An act to condemn fishing rights in fresh water lakes of the State for the benefit of the public was held unconstitutional as not a taking for public use, in the case of *Albright vs. Sussex County Lake Commission*, 71 N. J. Law, 303, DIXON, J., there says, at page 304:

* * * "Whether the end sought to be attained by the taking is a public use is a question to be determined by the courts, although it is said there is a presumption in favor of a use declared by the legislature to be public. * * *

"(p. 306) not only does the constitution require that the property taken should be for the public; it is also necessary that it should be for *use*. The chief purpose in the enjoyment of the property must be utility."

The Appellate Division made a reference to some bills pending in the New York legislature dealing with hydro-electric power development. But none of such bills became a law and none of them probably contemplated the development of power at Long Sault. There are serious obstacles in the way of development of the power at that point, and especially since one-half of the water in the River is owned by the Canadian Government and it would be necessary, in order to make use of the power, for the State to enter into a partnership with the Canadian Government and with the United States Government. Even then power could be developed at that point only by the investment of a vast capital, which it does not appear that the State had at its disposal.

In the light of these facts, it cannot reasonably be said that the franchises of the Long Sault Company are necessary to any present use contemplated by the State.

EIGHTH POINT.

The Repealing Act, in so far as it authorizes the State Comptroller to repay to the Company sums paid by it into the treasury under the act of 1907, is void in that it offends against the provisions of the State Constitution which declare: (1) that neither the credit nor the money of the State shall be given to or in aid of any corporation, (2) that the Legislature shall neither audit nor allow any private claim or account against the State, and (3) that the assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

(1) Section 1 of the Repealing Act declares the charter of the Long Sault Development Company unconstitutional; Section 2 directs the State Comptroller to repay to the company all sums which he has paid into the State Treasury, with interest, and Section 3 appropriates $36,320 out of moneys in the State Treasury for the purpose of making such repayment. These provisions provide for the payment to a *corporation* of moneys of the State. If no consideration was received by the State, then the payment provided for was a gift. Article 8, Section 9, of the Constitution is as follows:

> "Neither the credit nor the money of the State shall be given or loaned to or in aid of *any* association, *corporation* or private undertaking * * *."

It may be, as we have already argued, that sufficient moral consideration could have been found to support the repayment if the charter of the corporation had been unconstitutional. But the argument now being advanced is based on the assumption that the original Act was constitutional, and that the corporation has received the full consideration provided

for under the terms of the charter by being vested with property rights therein granted, and with the right to exist as a corporation, until the State should elect in a constitutional manner to repeal the charter.

The payments made by the corporation were made for the right to exist as a corporation until the State elected to repeal the charter, and, thereafter, to enjoy such property rights as survived the termination of its corporate existence. The trend of judicial decisions does not support the proposition that the State upon exercising its reserved power of repeal is either morally or legally obligated to return moneys previously paid by the corporation into the State Treasury.

In *Matter of Mahon vs. Board of Education*, 171 N. Y., 263, a statute appropriating moneys of the City of New York to create a pension fund for the benefit of retired public school teachers who had served thirty years or more, was held to be unconstitutional as being a gift of public moneys so far as the Act applied to teachers who had retired before the Act went into effect. CULLEN, J., there says at pages 265, 266:

> "In *Town of Guilford v. Supervisors of Chenango County* (13 N. Y., 143), the broad doctrine was laid down that 'the legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires or will be promoted by it, and it is the judge of what is for the public good.' This remained the law until 1875, when the people thought it necessary to impose restrictions, which was done by the constitutional amendments adopted in that year."

The amendments referred to were Section 9, of Article 8, and similar restrictions placed upon the appropriation of municipal funds. The court continued:

> "These amendments eliminated all considerations of gratitude and charity as grounds for the appropriation

of public moneys, except so far as by Article 8 it is provided that these restrictions shall not prevent the municipalities named from making such provision for the aid and support of their poor as may be authorized by law."

In *Fox vs. Mohawk Humane Society*, 165 N. Y., 517, an act providing for the payment of an annual license fee by the owner of every dog to the Humane Society, and further providing that the fees so collected should be used by the Society to carry out the provisions of the act appropriating the moneys and "for its own purposes," was held unconstitutional under Article 8, Section 9, as being a gift of the money of the State to a corporation. CULLEN, J.. at page 523, says:

> "The appropriation of public money for other than strictly governmental purposes and its expenditure through other than official channels, have been most carefully limited by Article VIII. of the Constitution."

See, also, *Trustees of Firemen's Fund vs. Roome*, 93 N. Y., 313; *People vs. Brooklyn Cooperage Co.*, 187 N. Y., 142, and for the reasoning of the court, *Shepherd's Fold vs. Mayor*, 96 N. Y., 137.

The Appellate Division held that the return of the moneys of the corporation was part of a scheme of condemnation evidenced by chapters 452 and 453 of the laws of 1913. If their view is correct, we must concede that Article 8 of the Constitution would not bar the repayment of the moneys in question to the corporation; but if the theory of that court is erroneous, as we think we have shown that it is, then the payments provided for in the Acts of 1913 constituted a gift of the moneys of the State to the corporation within the meaning of the constitutional prohibition.

(**2**) The following prohibition against the allowance of private claims against the State by the Legislature is contained in Article 3, Section 19, of the Constitution:

> "The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

The language of Chapter 452, Laws of 1913, allows a claim by the Long Sault Development Company against the State in the following terms :

> "SEC. 2. The state comptroller is hereby authorized and directed to cause the repayment and return to the Long Sault Development Company of any and all sums paid by such company into the state treasury, under the provisions of section 4 of chapter 355 of the laws of 1907, with interest on said respective sums from the times of their several payments, upon securing proper vouchers therefor; * * *"

No provision is made that any tribunal or officer of the State shall pass upon the propriety of such payment. The amount is definitely fixed in the act as being the total of the sums theretofore paid into the State Treasury by the corporation. The Comptroller is required to furnish his warrant for the amount of such payments, and the State Treasurer has no function to perform except to take a proper receipt upon the payment of the moneys.

In *Cole vs. The State*, 102 N. Y., 48, an act conferring jurisdiction on the Court of Claims to hear, audit and determine the claim of the Acting Captain of the Port of New York to compensation for services rendered in that capacity, was held not to offend Article 3, Section 19, of the Constitution, because authority was given to the Court of Claims to determine the claim, and it might have rejected it.

In *Cayuga County vs. The State*, 153 N. Y., 279, a statute was construed which authorized the Board of Claims to hear, audit and determine the claims of Cayuga County against the State for moneys spent in the trials of State prisoners. It was conceded that at the time the expense was incurred by the County the State was not liable for the expenditures. It was held that the statute did not offend the provisions of the Constitution because the claim was public and not private. In considering Section 19 the court says, by ANDREWS, C. J., at page 288 :

> "This section first became a part of the constitution by the amendment of 1874. It was intended to

> remedy the manifest evils of special legislation in the interests of private claimants, and to deprive the legislature of the power to pass laws which directly, and of their own force, should allow and fix the amount of private claims against the state. * * * It required their audit and allowance by some officer, board or tribunal designated by law, before the legislature could make an appropriation for their payment."

And again at page 290:

> "This section * * * inaugurated a new system regulating the audit, allowance and payment of claims against the state" and established the cardinal rule "that the audit and allowance of private claims should be made by somebody or authority designated by the legislature, and not by the legislature itself; * * *"
>
> See also *O'Hara vs. The State, supra.*

The Board of Claims is given authority by chapter 453 of the laws of 1913 to consider certain claims of the corporation, *but no jurisdiction is given to the Board to pass upon the repayment directed by Section 2 of chapter 452.* The legislative allowance of the claim therefore offends against the constitutional provision as being the allowance of a private claim against the State.

(3) Article 3, Section 20, of the Constitution provides:

> "The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes."

In *Waterloo Woolen Manufacturing Co. vs. Shanahan*, 128 N. Y., 345, it was held that a bill appropriating public moneys to improve the channel of the Seneca River and to provide races intersecting the Canal to facilitate the passage of canal boats, was not an appropriation for a private purpose within the meaning of the Constitution. The Court held that evidence outside of the act tending to show that the appropriation was intended to benefit private property and not to im-

prove navigation, should not be considered by the court. The decision of the Appellate Division holding the act void because not passed by a two-thirds vote, was reversed. The court says, at page 359:

> "The question always is, with respect to such bills, how is the purpose of the legislature to be ascertained? Must that be determined from the bill itself and from such considerations as the court can judicially notice, or is it competent to take proof and determine it as a matter of fact, as was done in this case? Reason and authority, as well as the fitness of things, demand that when an act of the legislature appropriating money is assailed upon the ground that the purpose of such appropriation is local or private and not public, the question shall be determined by the language and general scope of the act."

In *Wheeler vs. New York*, 190 N. Y., 406, the State had made a grant of lands to the plaintiff to which subsequent developments showed that the State had no title; the purchaser was ejected, and an act conferring jurisdiction on the Court of Claims to hear and determine the purchaser's claim against the State, was sustained. The decision was based on a statute which provided that when there was a failure of title to lands conveyed by the people, there should be a refund of moneys paid to the State. The court considered at some length, however, the effect of Article III., Section 20, and said at page 410:

> "The question, therefore, presented is, had the respondent such an equitable claim against the state for the refund of the purchase money it had received from him on the sale of land to which the state had no title and from which its grantee was ejected as to support the statute. That, as the deed contained no covenants, an action against a private grantor would not lie is conceded. * * * some of our number are inclined to doubt whether the mere receipt and retention by the state of money for which it had given no con-

sideration would create a sufficient claim in equity to authorize recognition of the claim by the legislature and the direction for its payment."

See, also, *Morris vs. People*, 3 Denio, 381.

If it be assumed, and we repeat that the present argument is based on that assumption, that the charter of the Long Sault Development Company was constitutional, it follows that full consideration has been given by the State for its original grant; and repayment of the moneys could not be sustained in that case as a recognition of a moral obligation so clear that the appropriation should be deemed to have been made for a public purpose.

The Attorney General cited below authorities to the effect that the Long Sault act was a private bill. This we concede, and we contend that the appropriation of public moneys to such a corporation under the circumstances of this case constitutes an appropriation for private purpose.

In *Town of Guilford vs. Supervisors*, 13 N. Y., 143, the highway commissioners of the town had, at the request of the inhabitants, conducted litigation in behalf of the town resulting in considerable expense being incurred by the commissioners personally. There being no existing statute under which they could recover from the town, an act was passed by the legislature appointing commissioners to determine the amount of their claim, and directing the supervisors of the county to collect a tax sufficient to pay the amount of the award. It was held that the act constituted an appropriation of public moneys for a private purpose, and that the legislature had authority to make such an appropriation, but only in case it complied with the provisions of the constitution requiring the assent of two-thirds of the members of the legislature to the passage of such a bill.

In *Mather vs. Delafield*, 3 N. Y. Legal Observer, 9, a statute was considered in which the title of the state to certain lands was granted to the plaintiff without consideration. It was held that an act appropriating public property to the use of an individual is a private purpose within the meaning of the constitution requiring for its passage the concurrence of two-thirds of the members elected to each house, and inasmuch as

it did not appear on the face of the bill that it had been passed by two-thirds, the court said, by COWEN, J. (p. 10):

> "Whatever might be urged in favor of presuming the act to have been passed by the requisite majority, if a public statute, it is clear that being private, we ought not to give it effect until the plaintiff shows, affirmatively, the constitutional vote."

Upon the face of the Act of 1907 creating the Long Sault Development Company it appears that the statute was passed by a two-thirds vote. The Repealing Act shows that it was passed when three-fifths were present, presumably for the purpose of bringing the act within the requirements of Section 25 of Article III. of the constitution; but it does not appear that the act was passed by two-thirds of the members of each branch of the legislature, and, by a reference to the Journal, it will be found that the act was not passed either in the Senate or in the Assembly by such two-thirds. From the Journal entries it appears that the Repealing Act was passed in the Senate by a vote of 32 to 12. There are 51 members of that body so that no less than 34 members would constitute two-thirds. In the Assembly the act was passed by a vote of 82 to 23. As there are 150 members of that body, 100 would be required to constitute a two-thirds vote. For the convenience of the Court copies of extracts from the Journal are printed at the end of this brief in Appendix G, and certified copies thereof will be submitted to the court. It was not necessary below to incorporate these facts into the record, since it is the practice for the Court itself to examine into the facts to determine the constitutionality of a statute. This was held in *People ex rel. Purdy vs. Commissioner of Highways*, 54 N. Y., 276, where a writ of mandamus was sought to compel the Commissioners of Highways to open a public highway pursuant to the provisions of an act of the legislature. The act purported to vest in a certain town the title of the state to the land required for the laying out of the highway. It was held that this act disposed of public property for a local purpose, and therefore came within the provisions of the constitution requiring a two-thirds vote to validate the

will. In holding the law invalid the court says, by JOHNSON, C., page 279 :

> " * * * when it is necessary to inquire by what vote a law was passed, the judges are to determine from the printed statutes, or from the laws on file in the Secretary of State's office, whether the requisite vote was received. Upon such an inquiry the printed volume is presumptively correct, and the original act is conclusive (See chap. 306, Laws of 1842) * * *."

From these decisions it follows (assuming, as we repeat, that the charter of the corporation was constitutional), that the Repealing Act, in so far as it attempts to compensate the Long Sault Development Company for the forfeiture of its charter rights, and to appropriate moneys for the reimbursement of amounts paid, is not valid and the question is, therefore, presented as to the effect of such invalidity upon the remaining portions of the act.

NINTH POINT.

The Repealing Act is unconstitutional and void as a whole for the reasons (1) that the repayment of the moneys paid to the State was an inducing cause of the legislation, and (2) that the court cannot say that the legislature would have passed the act if the unconstitutionality of the Long Sault Development Company's charter had not by its terms been expressly assumed.

(1) In *People ex rel. Purdy vs. Commissioners (supra)*, the court said, in referring to the lack of the necessary two-thirds vote, page 278 :

> " It is not important in this case to decide whether, by force of the constitutional provision, the whole of

every such bill is to be deemed inoperative as law in case any part of it contains such an appropriation, and the bill has not been passed in conformity with the constitutional requirement, or whether the provision may be satisfied by the rejection of that part only of such an act as makes an appropriation. In this case, the grant to the town of the public lands is so important a part of the whole provision that it cannot be doubted that, in the contemplation of the legislature, it was an essential and fundamental portion of the act, without which the bill would not have been passed at all."

The purpose of the Repealing Act was to make some compensation to the Long Sault Company for the repeal of the charter. The legislature did not intend without making compensation to take back the charter, even though void in its inception.

In *People ex rel. Manhattan Savings Institution vs. The Mayor*, 90 N. Y., 48, certain bonds issued by the City and owned by the bank had been lost. An act was passed directing the Mayor to issue duplicate bonds, and at the same time discharging the City from its obligation upon the original bonds after publication of notice and compliance with certain other provisions of the act. This feature of the act was held unconstitutional as impairing the obligation of a contract, and the whole act was therefore adjudged void. The court, by ANDREWS, C. J., saying, page 52 :

" Having reached the conclusion that the fourth section of the act is repugnant to the constitution, the provision in the second section requiring the city to issue duplicate bonds cannot be maintained as a separate and independent portion of the act. The provision exempting the city from liability to transferees of the original bonds, after the issuing of duplicate bonds, was a condition and compensation for the requirement that duplicate bonds should be issued, and it cannot be reasonably inferred that that requirement would have been made except in connection with the exemption in the fourth section. The requirement in the act in question

> is a part of a connected and dependent scheme, which falls with the failure of one of its essential features."

In the Repealing Act the intention of the legislature to compensate the corporation for the loss of its charter rights, unquestionably formed part of the legislative scheme. This is made manifest by reference to the title of the Repealing Act where it appears that the subject of the act is not alone the repealing of the charter, but an integral part of the subject is the "*providing for the repayment to such Company of certain moneys paid by it under such act and making an appropriation therefor.*" This statement was doubtless inserted in the title to comply with the requirements of Article III., Section 16 of the State Constitution, which provides that :

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

But if the repayment had been regarded by the legislature as a mere incident to the repealing provisions of the Act, it would have been unnecessary to mention it in the title. The fact, therefore, that it *was* mentioned, clearly indicates that the legislature regarded the repayment clause as an indispensable part of the Act. In the learned opinion of Chief Justice SHAW, of Massachusetts, in the case of *Warren vs. Mayor of Charlestown*, 2 Gray, 84, in which the act annexing Charlestown to Boston was held wholly void because of the unconstitutionality of certain sections of the act, the court said, at page 98 :

> "It is no doubt true, as has been argued by the learned counsel for the prosecutors of this writ, that the same act of legislation may be unconstitutional in some of its provisions and yet constitutional in others * * * but this must be taken with this limitation that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a

whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them."

In *Slauson vs. The City of Racine*, 13 Wis., 398, the statute under consideration annexed certain lands to the City of Racine and provided for the taxing of the annexed lands at a lower rate than other lands in the City. This provision was held unconstitutional, the court being of opinion that the lower rate of taxation was intended by the legislature as compensation for the annexation, and therefore part of the legislative scheme, and the whole act was adjudged void.

In *Pollock vs. Farmers' Loan & Trust Co.*, 158 U. S., 601, Chief Justice FULLER says at page 635:

* * * "in the case before us there is no question as to the validity of this act except Sections 27 to 37 inclusive, which relate to a subject which has been under discussion; and as to them we think the rule laid down by Chief Justice SHAW in *Warren vs. Charleston*, 2 Gray, 84, is applicable, * * * or as the point is put by Mr. Justice MATTHEWS in *Poindexter vs. Greenhow*, 114 U. S., 270, 304; 'it is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforcible even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

See also *Employers' Liability Cases*, 207 U. S., 463, 501.

The hardship to which the Long Sault Development Company would be subjected by the passage of the Repealing Act on any conditions, has been made manifest in this proceeding.

That those hardships were known to the legislature, and that they were intended to be met as far as possible by the legislative scheme, is evident upon the face of both Chapters 452 and 453 of the laws of 1913. This Court should not enlarge those hardships by straining for a construction of the Repealing Act which would sustain the repealing clause in the face of the unconstitutionality of the provisions for compensation, or by deciding that the element of compensation was an incidental rather than a material feature of the enactment.

(2) Section 1 of the act is an undisguised attempt on the part of the legislature to usurp the judicial function by declaring the act of 1907 to be unconstitutional, and on that ground alone to repeal it. This is beyond the constitutional power of the legislature and should not be tolerated by the judicial branch of the government.

By Article III., Section 1, of the Constitution of the State of New York, the legislative power is vested in the Senate and the Assembly. By Article IV., Section 1, the executive power is vested in the Governor. By Article VI., Section 1, the judicial power is vested in the Supreme Court in the following terms :

> "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article."

Probably no statute was ever passed by which a legislative body more boldly attempted to appropriate a judicial function than Chapter 452 of the Laws of 1913. By Section 1 it is enacted that the law of 1907 " is hereby repealed, *upon the following grounds.*" These grounds are then stated *in extenso* and correspond precisely with the grounds stated by the Attorney General in his opinion rendered to the Senate. Although in Section 4 of the Repealing Act it is stated that the enumeration of these grounds " shall not be deemed to qualify or impair the full force and effect of the repeal," that statement cannot mask the real ground for the attempted legislative action, which manifestly was to usurp the function of the

court in adjudicating that the act of 1907 was, for the grounds stated, unconstitutional. We presume that, if the legislature had simply said : " We are of the opinion that the act of 1907 is unconstitutional, and therefore, it is enacted that it be repealed," the court would have no difficulty in determining that such legislation was beyond the constitutional power of the legislature ; and the act as passed is substantially to that effect. Even if full force be given to the provisions of section 4, it still constitutes an attempt to accomplish indirectly what could not be done through direct legislative action.

An improper motive on the part of the legislature may be considered by the court when the motive appears on the face of the act.

Soon Hing vs. Crowley, 113 U. S., 703, 710.

In the Repealing Act no attempt was made to conceal the motive of the legislature. That body intended to decide by legislative enactment that the charter was unconstitutional and to repeal it for that reason.

In *People vs. Allen*, 42 N. Y., 404, an act appropriating moneys for the establishment of an astronomical observatory was held unconstitutional on the ground that the appropriation, although in form a loan, in fact amounted to an absolute appropriation. FOSTER, J., saying at page 412 :

> " It is idle to claim, because the legislature passes the act in such language that the transaction assumes the *form* of a loan, that it is any more binding, if it necessarily impairs the capital of the school fund, than it would be if, in terms, it declared the intention to donate the amount, or showed in direct language on the face of the act that it was intended to loan it upon a security which it knew to be entirely inadequate. *It is not enough to render a law constitutional, that its language should be in such form as to comply with the requirements of the constitution, but it must comply with them in substance.*"

In *Forster vs. Scott*, 136 N. Y., 577, in holding an act unconstitutional which provided for the taking of land for street

purposes without compensation, the court says, by O'BRIEN, J., page 584:

> "The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the constitution. What the legislature cannot do directly, it cannot do indirectly, as the constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it effects its free use and enjoyment, or the power of disposition at the will of the owner."
>
> See also *Matter of Hopper vs. Britt*, 203 N. Y., 144.

The court will have no difficulty in perceiving that the action of the legislature was based principally upon the assumption that the act of 1907 was unconstitutional. If that act was in fact constitutional the principle of the cases cited above requires that the entire Repealing Act should be held invalid, because the explicit phraseology of the Repealing Act makes it impossible to infer that, if the legislature had supposed the act of 1907 to be constitutional, it would have attempted to repeal it. The idea of unconstitutionality so dominates the entire act and is so interwoven with its enact-

ing provisions that if it were eliminated, the only apparent reason for the legislation would disappear. Furthermore, when considered in connection with the unusual form of the Act, there is another circumstance which is of almost conclusive significance.

It was on March 29th, 1912, that the Senate requested the opinion of the Attorney General as to the constitutionality of the Act of 1907 (R., p. 18). Although the resolutions of that body were expressed in considerable detail, there is no intimation of a repeal except on the ground of unconstitutionality. If it had been prepared to base a repeal on any other ground, it would have been unnecessary, since the Senate was then in session, to wait for the opinion of the Attorney General. The Senate, however, did wait until its next Session, and not until after it had received on December 30th, 1912, the opinion of the Attorney General, did it finally act. It is also to be noted that in the resolutions the Attorney General was requested to advise "what if any present action or proceedings may be brought by the State to ascertain judicially" (R., p. 19) the question of constitutionality; and it was only when he advised that "No legal proceedings, therefore, are necessary and it is not clear that any can be maintained in the courts to determine the constitutionality" of the grant of franchises, that the legislature proceeded to exercise the power which the Attorney General advised them that they possessed "to repeal an act passed by a former Legislature, *when deemed in conflict with the Constitution.*" (Appendix A)

Under such circumstances the court should not, merely on account of the provisions of Section 4, sustain the legislation on a fanciful theory that the legislature would have acted even if the Attorney General had advised that the act was Constitutional. The act should be declared void as a whole.

In *State vs. Poynter*, 59 Neb., 417, it was said (p. 434):

> "* * * if it is manifest, from an inspection of the law itself, that the invalid portion formed an inducement to its passage, the entire act will fail. * * * It is not necessary that the invalid portion of an act of the legislature should have operated as the sole in-

ducement to the passage of the law to render the same void. It will have that effect if the void part to any extent influenced the legislature in passing the statute."

In *Rathbone vs. Wirth*, 150 N. Y., 459, legislation dealing with the Police Department was held wholly void on the ground that the main purpose of the statute, namely, the appointment of the new police commissioner, was invalid. The court said, by GRAY, J., page 478:

> "In the performance of the duty of endeavoring to uphold the validity of a legislative act, the court may not carve out from its provisions, such as would make a law, to which the judicial approval might be given; unless the law then be such as can be deemed to have been within the contemplation of the legislature. In other words, the court is not to make a law for the people, but to uphold one which its representatives have enacted, and its duty, in that direction, where provisions are found which are antagonistic to any of the constitutional guarantees, is to see if by their excission the main object of the enactment can be preserved. If that object constitutes an evident interference with constitutional rights; if it can only be effectuated through unconstitutional provisions, then the court can do nothing and must pronounce its condemnation of the statute as a whole."

To the same effect is *Attorney General vs. Dover*, 62 N. J. Law, 40.

See also *Eckhardt vs. The State*, 5 W. Va., 515, and *Texas Pacific Railway Company vs. Mahaffey*, 98 Tex., 395.

Let the court strike from the act, as it must, paragraphs numbered First, Second, Third and Fourth of Section 1, all of Section 2 and all of Section 3, and no man can honestly say that the members of the legislature who voted for a bill containing those provisions would have voted for it after they had to be stricken out.

TENTH POINT.

Even if it be assumed that the Repealing Act is not void, this proceeding may be continued by and in the name of the corporation, since the Repealing Act continues the Long Sault Development Company in existence for the purpose of winding up its affairs.

Section 2 of the Repealing Act (Chapter 452 of the laws of 1913) after providing for the repayment of certain moneys to the company, enacts:

> "such company is continued in existence for the purposes only of receiving and giving proper vouchers for said moneys, making proper distribution or application thereof among its members or other persons entitled thereto, and the *winding up of its affairs.*"

If the charter of the Long Sault Development Company had been effectually repealed by a statute containing no saving clause, all litigation to which it was a party at the time would abate and could only be revived by the substitution of legal representatives of the stockholders and creditors of the corporation authorized to represent its property interests in the winding up of its affairs (*Rodgers vs. Insurance Company*, 148 N. Y., 34).

The same rule would doubtless apply as in the case of a judgment in favor of a dissolved corporation. In the absence of a saving clause in the Repealing Act the directors of the corporation would be constituted trustees of the creditors and stockholders with full powers to settle the affairs of the corporation as provided in Section 35 of the New York General Corporation Law.

The express statement in the Repealing Act that the existence of the Company shall be continued for the purpose of the winding up of its affairs is in accordance with the policy of the state to continue the existence for certain necessary purposes, of corporations after their dissolution. Section 221 of the General Corporation Law, in dealing with the voluntary dis-

solution of stock corporations provides, in subdivision 2, that "thereupon such corporation shall be dissolved and shall cease to carry on business except for the purpose of adjusting and winding up the business." Subdivision 3 of the section enumerates in greater detail the facts which the corporation as such may perform after dissolution, all of which obviously come within the meaning of the expression "winding up its business" which is used in the preceding subdivision, and which expressly includes the right to sue and be sued "until its business and affairs are fully adjusted and wound up." Under this statute and similar statutes the courts of this state have frequently recognized the existence of a corporation after dissolution for the purpose of bringing or defending actions in its corporate capacity in connection with the winding up of its affairs.

Cunningham vs. Glauber, 117 N. Y. Sup., 866 (App. Div., 1st Dept.).
O'Reilly vs. Greene, 18 Misc., 423 (Appellate Term).
General Railway Signal Company vs. Cade, 122 App. Div., 106.

In the cases cited the statutes construed expressly included the bringing of suits among the acts that the dissolved corporation might continue to perform, and they, therefore, may not be regarded as direct authority in the present proceeding. But no authority is necessary to show that the question here raised is a most vital affair of the corporation and that its affairs cannot be adequately *wound up* until it shall be settled. While the cloud rests upon the title of the corporation, it cannot make application to Congress, nor can it sell or convey its property. It could not pay its creditors or distribute its assets among the stockholders. But we need not enter upon an extended argument upon an obvious point.

The fact that the corporation is to continue in existence for the purpose of litigation is recognized in Chapter 453 of the Laws of 1913, which provides in Section 1 :

> "Jurisdiction is hereby conferred upon the board of claims to hear, audit and determine the alleged claims, if any, which may be presented *by the Long Sault Development Company* against the State of New York by reason of the repeal by the legislature of

chapter three hundred and fifty-five of the laws of nineteen hundred and seven."

Here is an express recognition that any claim arising on account of the Repealing Act is to be presented by the corporation itself.

Authorities upon this point may readily be found in decisions rendered under similar statutes.

In the case of *Pomeroy's Lessee vs. State Bank of Indiana*, 1 Wall., 23, it was held that a suit in ejectment begun prior to the dissolution of the defendant bank by an act of the legislature of Indiana, might be continued thereafter, in view of the provisions of the charter of the dissolved company, that after dissolution the corporation should continue for the purpose of collecting and closing up its business. Justice WAYNE expresses the opinion of the court as follows, at page 25 :

> " there can be no abatement of the case upon the counsel's suggestion, as it is declared in the charter of the bank, that though its charter should continue as such until the first day of January, 1859, and that all its banking powers should cease after the first day of January, 1857 ; that it should have all the '*necessary and incidental powers to collect and close up its business*' within which we deem the rights of the plaintiff in this court to be comprehended."

In *Muscatine Western R. R. Co. vs. Horton*, 38 Iowa, 33, it was held that a mandamus proceeding was properly continued in the name of the corporation after its dissolution, in view of a provision of the statute of Iowa that " Corporations whose charters expire by their own limitation or by the voluntary act of the stockholders, may nevertheless continue to act for the purpose of winding up their concerns, but for no other purpose."

In *Nashville Bank vs. Petway*, 22 Tenn., 522, the action on contract by the bank was continued after its dissolution, the court saying, page 529 :

> * * * " We felt no difficulty in arriving at this conclusion, because the 3d section of the charter of

> 1807 expressly provides, ' that the powers and obligations of the corporation shall in all respects continue, for the purpose of bringing the affairs thereof, which shall be depending on the first day of January, 1818, to a final settlement and determination.' "

In *Castle's Administrator vs. Acrogen Coal Co.*, 145 Ky., 591, an action was held properly brought against a corporation after its dissolution under the provisions of an act which provided that the corporation after dissolution * * * " may thereafter continue to act for the purpose of closing up its business, but for no other purpose."

The situation presented here is somewhat similar to that existing in *People ex rel. Reynolds vs. Common Council*, 140 N. Y., 300, where the relator applied for a writ of mandamus to compel the Common Council of the City of Buffalo to adjust and audit the damages which she had sustained in a street opening proceeding. In 1890 the legislature had passed an act authorizing the Common Council to audit and allow the claim. Proceedings were taken under the act before commissioners who made an award which was approved by order of the court. In 1891, the legislature passed an act repealing the act of 1890. The relator nevertheless presented the claim to the Common Council and when they refused to audit it, applied for the writ. The City urged that the act of 1890 was unconstitutional, and if, constitutional, that it had been repealed by the act of 1891. The relator claimed that the act of 1890 was valid, and that the repealing act was unconstitutional, in that it attempted to destroy a property right which had become vested by the confirmation of the report. The court considered these issues and held that the confirmation of the report by the court prior to the repeal of the act had created a contract obligation which could not under the constitution be destroyed.

Thus a repealing act was under consideration, and the Court, in the exercise of its discretion, ordered a writ of mandamus to issue, even though in so doing it became necessary to declare the repealing act unconstitutional for reasons similar in part to those urged in this proceeding.

ELEVENTH POINT.

The Court must necessarily pass on the constitutionality of Chapter 355 of the Laws of 1907 in passing on this application for a writ of mandamus.

Since both the Appellate Division and the Court of Appeals have regarded a remedy by mandamus as proper, we assume that the court will not re-examine the question as to whether it will lie. But we include the argument made below because it is properly to be considered in connection with the Points now being considered.

It was urged below that no duty was imposed by law upon the State Treasurer to receive the moneys tendered by the corporation, for the reason that Chapter 355 of the Laws of 1907 was unconstitutional and void.

Upon the authority of *People ex rel. Sherwood vs. Board of Canvassers*, 129 N. Y., 360, it is clear that the State Treasurer should not have ventured to pass upon the constitutionality of the Long Sault Act, and that in the absence of a judicial determination of that question, it was his duty to accept the money tendered whether the act was or was not constitutional. But inasmuch as an application for a writ of mandamus is addressed to the judicial discretion of the court, it is probably true that if the law was in fact unconstitutional, the State Treasurer would not have been compelled to perform a useless act. In the Sherwood case the relator received a majority of the votes cast for state senator in a certain district, and an application was made to the State Board of Canvassers for a certificate of election. The certificate was refused on the ground that under a provision of the State Constitution the relator was ineligible to election for the reason that he was at the time holding an office under a city government. The court held that the action required of the Board of Canvassers was ministerial, that they had no power of inquiring into or passing upon the eligibility of the relator to the office to which he had apparently been elected, and that it was their duty to give the certificate; but the court,

nevertheless, decided that inasmuch as the relator was in fact ineligible, it would not aid him to accomplish an unlawful result by granting the writ applied for. The Court says, by EARL, J., page 369 :

> " So we come to the important question underlying this case, ought the court to grant a mandamus to compel the issuing of a certificate of election to one who has no right under the constitution to the office? * * * Well-established principles of law and a strong current of authority require these questions to be answered in the negative.
>
> " A party can demand a mandamus only to secure or protect a clear legal right, never to accomplish a wrong. In *High's Extraordinary Legal Remedies* (§ 40), it is said : ' The writ of mandamus is never granted for the purpose of compelling the performance of an unlawful act, or of aiding in carrying out an unlawful proceeding ;' and in section 14, ' It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing.' "

Page 375 :

> " While, therefore, the state canvassers were bound to canvass the returns from the 27th senatorial district and to declare the result in compliance with the law, yet for reasons which we have given, the court will not aid the relator."
>
> See, also, *People ex rel. Sherrill vs. Conal Board*, 4 Lansing, 272.

Under the authority of these decisions, it may be that the court should have refused to aid the plaintiff-in-error, if it appeared that the act under which the moneys were tendered, was unconstitutional ; but the question of constitutionality thus became pertinent.

TWELFTH POINT.

The Act does not, Within the Meaning of Article 3, of Section 18, of the New York Constitution, Confer upon the Long Sault Company an "Exclusive Franchise."

(1) The grant of a water-power created by the erection of a dam is in its nature exclusive, and as we have shown in the Second Point, it has always been so regarded in New York State. The physical extent of the grant depends, of course, upon the natural location and surrounding conditions; but its exclusiveness cannot be determined by referring to the amount of horse-power developed. Whether undertaken by the State or by an agent of the State, the conservation of the energy of the water at a particular place by building a dam is a single project. If the state itself should build the dam for the purpose of improving navigation, it will not be denied that it could, as the owner of the power incidentally created, sell it to industrial concerns. That some one else builds the dam and agrees with the State to take the power by way of compensation for the cost of construction, does not convert the transaction into an exclusive grant; yet to the extent of the power privilege reserved to the builder, he must necessarily have a monopoly. It would be just as impracticable to attempt to subdivide the privilege among a number of competitors bidding for a portion of the power as it would be to divide a single dam into sections and let each section to a separate set of competing contractors. Just as the building of a single dam is, from the physical character of the work, a single project, so the right to enjoy the water-power created by the structure is, from the nature of the thing granted, necessarily exclusive.

The foregoing propositions were discussed and applied in the *Matter of Application of Union Ferry Company*, 98 N. Y., 139, in the case of the grant of an exclusive ferry franchise. It was claimed that an Act enabling the Union Ferry Company to acquire by condemnation the title to an additional ferry slip and facilities in the East River was unconstitutional under

Article 3 of Section 18 of the Constitution, because it granted to the Ferry Company an exclusive privilege or franchise. The Court of Appeals, however, held the Act to be Constitutional. Judge RAPALLO writing the opinion and speaking of the grant of the right as an exclusive franchise, said (p. 150) :

> "The constitutional prohibition was evidently aimed at monopolies. At granting to corporations or individuals not merely privileges and franchises not possessed by others, but the right to exclude others from the exercise or enjoyment of like privileges or franchises.
>
> "A special privilege or franchise is not necessarily 'exclusive.' The right of the patentee of an invention is 'exclusive.' So would be an act of the legislature which should attempt to confer upon a private corporation or individual the exclusive right to manufacture or vend any article of trade, and prohibit all other persons from competing in such business, or the exclusive franchise of operating a ferry or of maintaining a toll-bridge across a particular river, or of running stages on a highway, and prohibiting all others from competing, and the like.
>
> "But the grant of a particular power to a private corporation is not 'exclusive,' simply because the same power is not possessed by other corporations, so long as there is nothing to prevent the granting of such power to any other corporation. The constitution itself makes this distinction manifest. * * *
>
> "The word 'exclusive' is derived from '*ex*' out, and '*claudere*,' to shut. An act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise."

To illustrate his argument, Judge RAPALLO mentions, among others, as instances of exclusive franchises, the charter of the Cayuga Bridge Company, which provided that it should not be lawful to erect any bridge or establish any ferry within three miles of the place where the bridge of the Company was to be erected, and the charter of the Boston and Lowell

Railroad Company, which provided that no other railroad should, within a period of thirty years be authorized between Boston and Lowell. It was argued, as it might be in the present case, that the designation of a particular piece of property to be condemned for the purposes of the ferry, rendered the grant of the privilege exclusive, inasmuch as no one but the grantee could take the same property, but as to that claim, Judge RAPALLO said (p. 153):

> "That, however, is not, in our judgment, the nature of the exclusiveness contemplated by the Constitution. The exclusiveness prohibited is one which is created by the terms of the grant, not that which results from the nature of the property or right granted.
>
> "Where, from the nature of the case, it is impossible that the right or power should be possessed or employed by more than one party, and it is important to the public interest that it should exist and be exercised by some one, the State must necessarily have authority to select the grantee. In such a case the exclusiveness is not produced by the grant, but results from the nature of the thing granted, and to this extent every grant to a corporation or an individual, of the right to acquire real estate, is exclusive. Where a toll-bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive. So of all lands acquired by a railroad company for depots, car yards, etc., their right to enjoy those lands is exclusive. The right of the owner of upland to fill out into waters of the State in front of his land is exclusive in respect to the particular property involved, though a similar right may be conferred upon every person owning lands similarly situated. There may be cases where a railroad could not be extended without passing through lands situated at its terminus, which were already devoted to a public use, and could not, therefore, be acquired for railroad purposes under the general law, or without express authority from the legislature. Can it be contended that, however great the necessity for the extension, the legislature would have no power to grant such authority; and yet the grant of power in

such a case would be exclusive in the same sense as is the power to extend the facilities of the ferry in the case before us. We think that in all these cases the exclusion of others from the enjoyment of rights or privileges similar to those bestowed upon the particular grantee, must, in order to come within the constitutional prohibition, result from the provisions of the grant and not from the inherent nature of the right granted."

See, also, *Matter of Gilbert Elevated Railway Co.*, 70 N. Y., 361, where it was held that it was difficult to construe the word exclusive as "anything less than an absolute monopoly" (p. 370):

The principle of the *Union Ferry case* clearly applies to the grant of a right to build a dam across a navigable river, for the reason that there is no grant of the privilege of using the water power which is not related *by nature* to the building of that particular dam. Where a right is given to build a bridge and a condition is imposed that another bridge shall not be built within some stated distance up or down the stream; or where a ferry is established at a particular point and a similar stipulation is made which excludes the granting of a ferry-right for some arbitrary distance up or down the stream; such provisions tend to create a monopoly, because their exclusive character is created by the terms of the grant and does not result from the nature of the project. The grant not only creates a monopoly in the particular bridge or ferry authorized, but by the *terms of the grant* it disables the state, even though the needs of the public may require it, from making a similar grant to any one else of some other bridge or ferry right having nothing but a *business* relation to the subject of the original grant.

The right to use power created by building a dam is no more susceptible of a grant to two competing grantees than is the franchise to establish a ferry, or to build a bridge, or to establish a toll turn-pike, or to maintain a railroad terminal. Theoretically, in any of these cases it would be possible to reserve the right of others to participate in the public grant. For instance: in the case of a toll-bridge it would be possible for the State to grant to a number of persons the right to

enjoy the tolls during different hours of the day; or it would have been possible to create competition with the Union Ferry Company by providing that during a part of the day, competing ferryboats upon the river should be permitted to use, upon suitable terms, the ferry houses of that Company; or provision could be made by grant for the accommodation in a railroad terminal of rival lines of railroads, thus bringing the several grantees into competition with each other in the enjoyment of the franchise. If provisions of the kind indicated in these instances were the test of exclusiveness, then the grant of a water-power might be held to be exclusive, because after it was created, the profits could be made subject to apportionment among persons other than those who had built the dam. But this view of the character of such franchises leaves out of view the fact that, by nature, bridges and ferries and turnpikes and power dams are single projects, and that their usufruct is practically indivisible and has always been so treated in public grants.

Our view that the grant of a water-power is not in the nature of an exclusive franchise is borne out by the uniform practice of the Legislature in making such grants not only before, but also since, the adoption of Section 18 of Article III. of the Constitution. This practice is fully set forth in the Second Point. Its continuance after 1875 with the exclusive feature retained derives greater significance from the fact that dam privileges have become of much greater importance since water-power has become such an important agency for the economical generation of electrical energy.

We again refer to the exclusive grants made by Chap. 234, Laws of 1898, Chap. 683, Laws of 1900, Chap. 154, Laws of 1900, Chap. 175, Laws of 1900 and Chap. 564, Laws of 1903, above referred to.

These special acts are typical of those which have been passed by the State since 1875, and are similar to the acts passed prior to that date, in that they grant the exclusive right to use for power purposes all of the water made available by the erection of the dam. In many of the cases provided for in the special acts, the ponding of the water by the dam has affected a limited area. But the character of the grant is not more exclusive because the size of the river requires a dam which would pond the water for a distance of several

miles rather than a few hundred feet. The greater area over which the public would be excluded would in that case be due to the natural characteristics of the river and not to any arbitrary limitations contained in the grant itself. The Attorney General contends that Section 3, of the Act, is significant, because it authorizes the Company "to take and use the waters of said River at and *above* the points of location of said works heretofore authorized." But the water used to produce power is *always* "at and above" the dam which stores it; and the storage basin must vary according to the size of the river, the angle at which the water descends and the conformation of the shores.

It has been contended that the omission in the Act to provide for the payment of compensation to riparian owners for the destruction of their rights, is a circumstance having an important bearing in determining the exclusiveness of the legislation.

But if the State is without power to destroy riparian rights without compensation, a remedy would exist to recover damages for such loss. The fact probably is, however, that when the State for a public purpose erects a dam in a navigable stream and raises the level of the water so as to submerge the land of a riparian owner where he had had the usual right to withdraw water for power and other purposes, any such right is destroyed and the riparian owner is not entitled to compensation therefor. It is sufficient upon this point to cite the leading case of *People vs. Tibbetts*, 19 New York, 523, where the State sought to recover rents under a lease of one-half of the surplus waters of the Hudson River of the Troy Dam. The defendant contended that he was entitled, as a riparian owner, to the use of the water and that the lease was without consideration. The Court, however, per STRONG, J., page 528, said:

> "The riparian owner may undoubtedly use the water passing or adjoining his lands for his own advantage, so long as he does not impede the navigation, in the absence of any counter-claim by the State as absolute proprietor. But the State may, as such proprietor of the waters, grant them, or any interest in them, to an individual. If there is any restriction upon such power,

it is that which is imposed by the Constitution of the United States. * * *

"It is beyond dispute that the State is the absolute owner of the navigable rivers within its borders, and that, as such owner, it can dispose of them to the exclusion of the riparian owners."

The same principle was applied in the leading case of *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Company*, and in the *Chandler-Dunbar* case, *supra*. As the Long Sault Company merely succeeds to the rights of the State, no riparian owner could assert as against it, a claim for damages on account of rights destroyed by the improvement. That being so, the omission in the Act to provide for the payment of damages to riparian owners, is of no consequence in considering the question whether the grant to the Company constitutes an exclusive franchise.

But even if we are wrong in this conclusion it would make no difference in the interpretation of Section 18 of Article 3 of the Constitution. For it is the rights of the public at large, represented by the State government, and not the private rights of individual property owners, that that provision of the Constitution is intended to protect.

(**2**) We have already adverted in the Second Point to the fact that the streams of this State have been of such a character that the State has not developed them for navigation purposes to an extent so great as in other states of the Union, and we have pointed out the causes for this condition. There is nothing, however, in the laws or in the constitution of the State of New York, which would have prevented the State itself from undertaking the expense of improving the navigation of the St. Lawrence River, and such an undertaking would have been public and not private; and it is equally true that it would be entirely legal for the State to make compensation in any legal form to contractors employed as the agents of the State to do the work. A common form of such compensation, as we have pointed out above, is the right to collect tolls from vessels enjoying the improved navigation. But there is no reason why the compensation should not, in

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the discretion of the State itself, be the right of enjoyment of the profit derived from the sale of the power developed by the erection of a dam.

The nature of the usufruct of the surplus water produced by a dam erected to improve navigation was considered by the Supreme Court of the United States in *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Company, supra*, and the decision of the court is very instructive upon the point now being considered.

On the admission of Wisconsin to the Union as a State, Congress granted to it lands, the proceeds of which were to be used in improving certain waterways of the State, and a company was organized under legislative authority of the new state which with such proceeds constructed in the Fox River, a navigable stream, dams and other works. The works so constructed were subsequently purchased by the United States government, but the right to use the surplus waters made available by the erection of the dam and not required for the purpose of navigation, was not so transferred. The United States assumed possession and exclusive control of the river and expended a large amount of money in its improvement, while the Canal Company continued in possession of the water power. The controversy in the *Kaukauna* case was between the grantee of the State and a riparian owner who claimed to be entitled to use a portion of the surplus water above the dam for power or other purposes; but it was held that he could not complain, for the reason that the project was undertaken by the state and it was entitled to dispose of the surplus water for its own advantage, even though the riparian owner, but for the dam, would, to some extent, have been able to use the water as it flowed past his property. The court said that a state probably could not appropriate the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes and then proceeded (p. 273):

> "But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or

disposing of such water as an incident of its right to make such improvement. * * * *As there is no need of the surplus running to waste, there was nothing objectionable in permitting the state to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.* * * *

"There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed it seems to have been the practice, not only in New York, but in Ohio, in Wisconsin, and perhaps in other States, in authorizing the erection of dams for the purposes of navigation, or other public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the State; and where the surplus thus created was a mere incident to securing an adequate amount of water for the public improvement, such legislation, it is believed, has been uniformly sustained (p. 274). * * * The dam was built for a public purpose, and the act provided that if, in its construction, any water power was incidentally created, it should belong to the state, and it might be sold or leased in order that the proceeds of such sale or lease might assist in defraying the expenses of the improvement (p. 281)." * * *

See, also, *U. S. vs. Chandler-Dunbar, supra,* at p. 73.

Assuming that the State desired the improvement of the St. Lawrence River and the building up of the industries of the State, with the resulting increase of taxable values, and that the Long Sault Act was passed to accomplish that result, the arrangement was to be in effect a mere business contract under the terms of which the Long Sault Company would expend a very large amount for the improvement of navigation, would maintain and operate free of charge the locks necessary for purposes of navigation, and would pay to the State out of the amount received by it for the sale of electrical or mechanical power, a large annual percentage of the gross amount received from the sale of power, without

any risk to the public that, in the event of the failure of the corporation, the permanent improvement of navigation would be affected. Such an arrangement does not exclude the public from the enjoyment of public property. That was the situation which the Supreme Court had under consideration in the *Kaukauna Company* case, which was subsequently described by the Supreme Court of the United States in *Greenbay, etc., Canal Company vs. Patten Paper Company* (172 U. S., 58), in distinguishing several State Court decisions as follows :

> " In none of them (*i. e.*, the decisions) have we found that, by the state legislation, was there a fund created out of the use of the surplus water, to be expended in the completion and maintenance of the public improvement. As we have seen, the entire legislation, state and Federal, in the present instance, has had in view the dedication of the water-powers incidentally created by the dams and canal to raising a fund to aid in the erection, completion and maintenance of the public works ; * * * "

If the consideration agreed to be paid by the State is excessive, that fact does not transform the grant into an exclusive franchise. The amount of the consideration is a matter resting wholly in the discretion of the legislature, and is beyond the power of the Courts to question or to make the basis for a holding that the Act is unconstitutional.

But it may be said that the Long Sault project was essentially a power development and not a scheme for the improvement of navigation, and that the improvement of navigation was incident to the creation of the water-power, rather than that the development of power was incident to the improvement of navigation. This point is to a great extent covered by what we have said in the Second Point. It is only necessary to add a few words here.

If the fact is that the navigability of the river will be improved, the purpose is a public one and the Court should not assume, in order to declare the Act unconstitutional, that such purpose was subsidiary. In *Huse vs. Glover, supra,*

it was claimed that the locks and dams constructed by the State did not aid navigation but were an impediment. The Court held, however, that the State was the agency which was to determine what promoted navigation, and that its decision was final so long as Congress did not interfere; and, independently of any such rule, there are ample indications in the Long Sault Act itself, as we have pointed out in the Second Point, that its purpose was to improve navigation and, therefore, that its purpose was a public one. The only conclusion possible, therefore, is that if the Legislature had not expected that the works to be erected would improve navigation they would not have passed the Act. It results that the purpose of the Act was public and not private.

Assuming, therefore, that the Act was passed for the public purpose of improving navigation, it follows that it was competent for the State, irrespective of Article III, Section 18, of the Constitution, to agree to pay as compensation for the construction of the works, a part of the profit derived from the utilization of the surplus water, after deducting therefrom the expense of maintaining the locks and other similar works, based upon the total electrical or mechanical horse-power produced by the fall of water.

THIRTEENTH POINT.

The land under the water of the St. Lawrence is not a part of the Forest Preserve. The provisions of Section 4 of the Act authorizing a grant by the Land Commissioners of such lands to the Company are not therefore, in violation of Section 7, Article VII., of the State Constitution prohibiting the transfer of lands constituting the Forest Preserve. But even if Section 4 does violate that Article of the Constitution the entire Act should not be set aside, because (1) the provisions of Section 4 amount to nothing more than the grant to the Company of an option to purchase the lands under water; and (2) the acquisition by the Company of the lands under water is not an essential feature of the Act, and it may be stricken therefrom without affecting the validity of any of its other provisions.

Before discussing the question whether the provision contained in Section 4, which empowers the Company, under certain circumstances, to acquire title to lands of the State under the waters of the St. Lawrence River is in contravention of Article VII., Section 7 of the State Constitution, we shall consider whether that provision is an essential part of the Act and whether the remaining portions of the act should not be sustained, even though such provision were held unconstitutional.

(1) Section 4 of the act provides as follows, viz :

> "§ 4. After the congress of the United States shall authorize the construction of dams, locks and canals hereby authorized and after the payment by said corporation into the treasury of the state of the fixed sum of ten thousand dollars, the commissioners of the land

office shall, upon application of said corporation, grant unto it the title and interest of the people of the state in and to lands under the waters of the Saint Lawrence river to be covered or occupied by said works and locks and power-houses, provided, however, that any of the lands of the state which may be so conveyed to said corporation shall be forfeited and title thereto shall revert to the State unless the same are actually used by said corporation and covered by its dams, canals, reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments or other works appertaining thereto, or are necessary to the enjoyment for said purposes of any lands so used or covered, within fifteen years from the conveyance thereof by the commissioners of the land office to said corporation under authority of this act * * *."

With the exception of the language quoted above, the Act is silent as to the conveyance of the title to lands by the State. The act itself, therefore, does not contain any grant of title; and such grant is not to be made unless Congress shall previously have authorized the construction of the dams and other contemplated works; and, even in the event of such authorization being obtained, the grant of title is not to be made unless, (*a*) the corporation pays $10,000 to the State, (*b*) the corporation applies to the Commissioners of the Land Office for a conveyance, and (*c*) the land conveyed is to be used for the works, locks, and power-houses of the corporation.

Section 9 of the Act provides:

> "The said corporation shall begin the work of constructing its dam pursuant hereto within one year after the congress of United States shall authorize the construction of dams, locks, and canals hereby authorized, and in case such construction shall not be so begun the grants, rights and privileges hereby granted, may be forfeited."

An imperative duty is thus imposed upon the corporation whether or not it shall acquire title to the land under water,

to proceed on penalty of forfeiture with the work of construction within one year after the appropriate authorization has been obtained from Congress; and, as Section 4 imposes no limit of the time within which the corporation may make an application to the Land Office for a conveyance of title to lands of the State, it is clear that every other right of the corporation may be exercised and that the full intent of the act may be carried out, before any application need be made by the corporation to the Commissioners of the Land Office. Obviously, then, no essential feature of the act is interwoven with or dependent upon the application for a grant of title to the land. The most critical reading of the act only emphasizes the fact that the application provided for is optional with the corporation, is independent of all other provisions of the act, and was not intended as a condition precedent to the exercise of any other power granted. The right to apply for the grant was dealt with as a privilege which the corporation might exercise or ignore, and not as an essential part of the act. Had the legislature been advised that this portion of the act was unconstitutional, there is certainly nothing before us to suggest that it would on that account have withheld the other rights contained in the act. If the grant of title had been deemed an essential part of the general scheme, it is fair to assume that it would either have been contained in the act itself, or would have been made a prerequisite to the exercise of some important right thereunder. Certainly the taking of title would not in that case have been left entirely within the discretion of the corporation to avail of it or not, as it should elect. If the Company chooses to expend its money in constructing the works upon land belonging to the State, which, under the Constitution, it may not convey, that is the concern of the stockholders. It is not a situation of which the State has a right to complain.

We therefore suggest that the act may well stand by itself without regard to the constitutionality of this unimportant provision; that the validity of the provision need not be passed upon at this time, and that, if eventually it is construed in some appropriate legal proceeding and held to be invalid, it may then be stricken out without in any way affecting the constitutionality of the act as a whole.

In *Allen vs. Louisiana*, 103 U. S., 80, Chief Justice WAITE states the principle upon which an act is to be deemed constitutional, even though a part of the act is held unconstitutional. At page 83 he says :

> " It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. * * * The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

To the same effect is *Huntington vs. Worthen*, 120 U. S., 97.

In the *Matter of Village of Middletown*, 82 N. Y., 196, it was held that a statute entitled " An act to supply the village of Middletown with water for public and private purposes " was unconstitutional in so far as it provided for changing the amount of compensation awarded by the commissioners in condemnation proceedings. The Court said, by FINCH J., page 202 :

> " But it does not necessarily follow that this unconstitutional provision destroys the whole act. Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in subject matter, meaning, or purpose, that it cannot be presumed the legislature would have passed one without the other. * * * The rule, gathered from a large number of cases, has been well stated to be that ' if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.' "

See also *People ex rel. Angerstein vs. Kenney*, 96 N. Y., 294.

In the *Matter of New York & Long Island Bridge Co.*, 148 N. Y., 540, a statute entitled "An act to incorporate the New York & Long Island Bridge Company" with several amendments was examined and sustained by the court as a whole, although various provisions authorizing the use of the bridge for railroad purposes and extensions of the approaches were declared unconstitutional.

The same rule was stated by PARKER, C. J., in *Bohmer vs. Haffen*, 161 N. Y., 390, in dealing with a statute entitled "An act to authorize the construction of a railway and tracks in the towns of West Farms and Morrisania." Certain parts of the act were lopped off as unconstitutional, and the remaining portions of the act were sustained.

The same principle was applied in the following decisions:

People ex rel. Fowler vs. Bull, 46 N. Y., 57, 69.
Gordon vs. Cornes, 47 N. Y., 608, 617.
People ex rel. Rochester vs. Briggs, 50 N. Y., 553.
Matter of Sackett Street, 74 N. Y., 95.
Matter of Metropolitan Gas-Light Co., 85 N. Y., 526.
Duryee vs. Mayor of City of N. Y., 96 N. Y., 477.
Skaneateles Water Co. vs. Village of Skaneateles, 161 N. Y., 154.

(**2**) If the provisions of Section 4 for the grant of land under water were omitted, the grant would amount to neither a lease nor a sale of the land under the water of the river, but would constitute a contract between the State and the Company for the construction and operation of a public improvement, such as was under consideration in *Niagara County Irrigation and Water Supply Company vs. College Heights Land Company*, 111 Appellate Division, 770, and in the *Matter of New York and Long Island Bridge Co.*, 90 Hun, 312, and again 148 New York, 540.

The decision in *Niagara County Irrigation and Water Supply Company vs. College Heights Land Company*, is particularly apposite. In that case the charter of the Niagara County Irrigation and Water Supply Company was created under a special act of the legislature, which authorized the construction and maintenance of a public waterway from the Niagara River, and the supplying from such waterway and the conduits leading therefrom, of pure and wholesome water to certain villages and the "storage, accumulation, conduct,

supply, lease and sale of water for fire, sanitary, municipal, mechanical, mercantile, manufacturing, domestic, commercial or agricultural purposes, including the purpose of irrigation." The Company was authorized to take water from the Niagara River and discharge it at a point below the point of intake. It was also authorized to construct piers, dams, gates, tunnels, pipes, sluices and other similar structures, "provided that in case of pipes or tunnels under the waters of the Niagara River they are so laid and constructed as not to interfere with the navigation of said river."

It was urged that the Act was unconstitutional because it was "for local or private purposes," and that, although it appropriated public property for local or private purposes, it did not receive the assent of two-thirds of the members of the legislature as required by Section 9 of Article I of the Constitution of 1846, which is the same as Section 20 of Article III of the present Constitution of 1894. The Court held that "the State was in a certain sense the owner of the bed of the river. It held the title not as proprietor, but as sovereign, in trust for the public." Nevertheless the Court held that the transfer of the right to use the bed of the river in the exercise of the corporate rights conferred upon the Water Supply Company, was not the appropriation of public property. Judge WILLIAMS, writing the opinion of the Court, said (p. 773):

> "There is a view taken of such acts as the one in question, which seems reasonable, that the Legislature does not transfer any title to the bed of the river to the corporation, and does not even license the use thereof, but merely confers the power upon the corporation to do what is necessary to carry out its purposes. It does not confer any right upon the corporation to take or make use of the property of other persons or of the State until it has acquired such property in a legal way (Matter of New York & L. I. Bridge Co., 90 Hun, 312, 326; S. C. on appeal, 148 N. Y., 540, 555). In this view the act is not to be regarded as appropriating any property of the State to the use of the corporation, either in the water or the bed of the stream, in violation of the provision of the Constitution in question. It has designated the general powers of the cor-

poration, and if any property rights are required from the State involving the appropriation of property they must still be acquired in a manner provided by law under the Constitution. We do not think a necessary construction of the act requires us to hold it violates the constitutional provision in question."

In the *Long Island Bridge* case, cited in the *Niagara County Irrigation and Water Supply Company* case, the Bridge Company was a corporation created under a special act of the legislature to build a bridge over the East River. The Company was authorized to use and occupy lands under the waters of the East River, and the application of the same provision of the state constitution as that involved in that case was considered. The Court, page 325, said:

"Upon this question we prefer to rest our decision, upon the ground that by the act of 1892 there is no appropriation of public moneys or property for a local or private purpose. It is true that the act authorizes the use and occupation of lands under the water of the East River for the location and construction of piers. * * * It is insisted that this land belongs to the State of New York in virtue of its sovereignty, and that it is appropriated by this act. * * * The question of whether the lands under water of the East River, either between high and low-water mark or below low-water mark, belong to the State or the city, in our view, is immaterial, because we do not consider the act of 1892 as a grant of any property rights. It certainly would not be seriously contended that in granting the right to place the bridge between certain streets and in certain localities, the intention was expressed on the part of the Legislature to grant the property within the limits fixed. So here, the authority 'to use and occupy so much of the lands under water of the East River,' etc., is only the conferring of power to do what was necessary to be done in connection with the construction of the bridge, coupled with a restriction that the bridge corporation

should not go beyond the exterior pier line, thus locating and defining the situation of the piers, leaving the corporation to proceed in the manner provided by statute for the obtaining of property, and whatever other rights are necessary and requisite for the location and construction of its piers."

On appeal to the Court of Appeals in the *Long Island Bridge Case*, the Court said (p. 555) :

> "The various acts under which the Bridge Company is proceeding vest it with power to purchase and acquire lands, and it would seem to be very doubtful whether, in any of the acts, there is an appropriation of lands in a legal sense.
>
> A route is laid out and the Company is left to acquire title by purchase or condemnation."

The Long Sault act comes clearly within the principle of these decisions, and even if it be held that by Section 4 of the Act, the contemplated conveyance to the Company is contrary to the provisions of Section 7, Article VII. of the Constitution, it will still be entirely possible to declare that provision to be void and yet sustain the Act as a grant to the Long Sault Company of the right to construct a public work and exercise its corporate rights and powers in respect of the incidental water-power created in connection therewith.

(**3**) In the light of the foregoing reasoning it is apparent that the constitutionality of those portions of Section 4 of the Act which were under consideration was not material to the decision of the Court below. If it had been important, however, it could have been shown with reasonable certainty that Section 4 does not offend against the constitutional provision, for the reason that the lands under the waters of the St. Lawrence River upon which the Long Sault Development Company was authorized to construct its works, are not part of the Forest Preserve as defined by the State Constitution.

Section 7 of Article VII. of the Constitution provides as follows :

> "The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed

> by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

The land which the State is authorized under the Long Sault charter to grant to the company lies under the water between the uplands and the international boundary line. At the point in question the uplands are not wild, but are arable and cultivated, except so far as they lie in the settled portion of the town of Massena Center, which is a small settlement about three miles distant from the river, or of Massena, a somewhat larger town, about five miles away. There has not been for many years any extensive forest in the vicinity, and it is over 30 miles from the Long Sault Company's proposed works to the edge of the State lands in Adirondack Park. Long Sault Island and Barnhart's Island have been settled as farming communities for upwards of fifty years (R., p. 35). There are no forest lands within 25 miles of the St. Lawrence River in St. Lawrence County nor have there been any forest lands in that locality for more than 30 years (R., p. 35).

When Article VII., Section 7, was inserted in the Constitution in 1894 the only statutory definition of the territory designated as the "Forest Preserve" was contained in Chapter 332, § 100, of the Laws of 1893 by which it was described as follows, viz.:

> "The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of Clinton, except the towns of Altona and Dannemora, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except
>
> 1. Lands within the limits of any village or city and
>
> 2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund."

An examination of the earlier legislation upon the subject will show that it could not have been the intention of the Legislature to include as part of the forest preserve land under the waters of the St. Lawrence River.

The forest preserve was established by Chapter 283 of the Laws of 1885. This act had been preceded by investigations under legislative sanction concerning the wild or forest lands of the State. By Chapter 499 of the Laws of 1883 provision had been made for the survey of "detached portions of state lands" in certain counties lying "in the northeastern portion of New York and Adirondack wilderness." Under this act the Superintendent of the Adirondack survey on February 28, 1884, made a report which dealt exclusively with the subject of forest preservation and stated among other things that "scattered portions of State lands are found northward *almost* to the Canadian boundary." In respect of land in St. Lawrence County the report spoke only of "*forests and wild lands*," and in the list which was made a part of the report no mention was made of any St. Lawrence County lands lying under the waters of the river. Under the provisions of Chapter 551, p. 723, of the Laws of 1884 a board of experts was appointed to "investigate and report a system of forest preservation." This Board made a report on January 23d, 1885, which moved the Legislature to pass Chapter 283 of the Laws of 1885, above referred to (*Saranac Land & Timber Co. vs. Roberts*, 195 N. Y., 303). The report recommended the passage of two proposed bills. The first of these bills contained a preamble as follows: "Whereas it is requisite for the maintenance of important water courses within this State * * * and otherwise for the general welfare and public purposes of the State, that the *Adirondack forest* should be preserved and that the lands in their vicinity which are not fit for tillage should become and remain covered with forest trees." The other bill related to "taxes upon the *forest lands*" and defined these lands in certain counties as constituting "*the forest preserve and as being lands covered with trees, saplings, sprouts or seedling trees and lands which, although not so covered, are wild and not customarily tilled, or used for building sites.*" There was attached to the report of the Board a statement of the acreage of "forest or wild and cleared or improved lands in the Adirondacks," but no lands in the

vicinity of Massena or under water in the St. Lawrence River were referred to.

Chapter 283 of the Laws of 1885 followed upon these reports, and was as stated in its title "*for the preservation of the forests.*" By Section 7 of the Act it was provided as follows, viz.:

> "All the lands now owned or which may hereafter be acquired by the state of New York, within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve."

By Section 8 of the act the forest preserve was to be forever kept as "*wild forest lands.*" By Section 16 of the Act the Commission appointed under its provisions was required to make a written report to the legislature in January of each year, together with recommendations in respect of further legislative or official action. In its first annual report the Commission referred to the Forest Preserve as being located in the eleven counties in the "Adirondack region" and stated that "*its northern border adjoins the farming lands along the St. Lawrence River.*" This report contains a detailed list of lands within the Forest Preserve by counties, *but no mention is made of lands under the water of the St. Lawrence. All the later annual reports of the Commission* contain lists of "areas of Forest Preserve," but the whole subject is dealt with from the standpoint of forest preservation and *there is no reference to any land under water.*

It seems to be quite plain from this examination that the Commissions who examined the subject as a basis for legislation and the Forest Commissions charged with the duty of administering the laws understood that the forest preserve did not include land under the waters of the St. Lawrence River. There is, moreover, in the constitutional provision itself internal evidence of a similar intent, for it is provided by Article VII., Section 7, that the lands constituting the forest preserve "shall be forever kept as *wild forest lands.*" The words "wild forest lands" as thus used cannot be given their ordin-

ary significance if they are construed to include lands lying under the waters of the St. Lawrence River, for such lands are not ordinarily designated as wild; and to characterize them as "forest lands" would be to give to the word "forest" a meaning unusual, unnecessary and quite inconsistent with the spirit of the provision as indicated by its historical source.

There is no indication that a different view of the limits of the forest preserve has been held by Forest Commissions or by legislatures since 1894.

By Chapter 484, Laws of 1896, vol. 2, p. 580, the legislature incorporated the St. Lawrence Power Company and conferred upon it power to build at Massena, St. Lawrence County, a canal and to draw off water from the St. Lawrence River for power purposes and to build dams, piers and a variety of permanent structures in the St. Lawrence River.

In a number of instances since 1894 the legislature has authorized the construction of dams across the Hudson River, and in one instance across the Mohawk River, at points within the Forest Preserve Counties and not within the limits of any village or city, and has granted the title of the state to the lands under water covered by works constructed by the owners of the dams. Grants of this character are contained in the following statutes:

Laws of 1900, Chapter 33, authorizing the Hudson River Water Power Company to erect and forever maintain a dam across the Hudson River at any point between Glens Falls and Palmers Falls in Saratoga and Warren Counties, and granting to the Company the title of the state to lands under the waters of the river covered by the dam and the works or flooded by the erection of the dam.

Laws of 1900, Chapter 175, authorizing the Hudson River Power Transmission Company to build a dam across the Hudson River in Saratoga County and maintain it forever. The Corporation was granted the interest of the state in lands under the waters of the river covered by the dam and other works.

Laws of 1900, Chapter 683, authorizing the Hudson River Water Power & Paper Company to forever maintain a dam across the Hudson River at Mechanicsville, partly in Saratoga County and partly in Rensselaer County, and granting the

interest of the state in the lands under the waters of said river covered by said dam and the buildings and works of the company connected therewith.

Laws of 1901, Chapter 164, authorizing the Waterford Electric Light & Power Company to construct a dam across the Hudson River in Saratoga County and to forever maintain the same and granting the interest of the state in lands under the waters of the river covered by said dam and by the works of the company and the land flooded by the erection of the dam.

Laws of 1901, Chapter 501, authorizing the Niskayuna Power Company to construct a dam across the Mohawk River in Saratoga County and to forever maintain the same, and granting the interest of the state in lands under the waters of the river covered by the dam and the works of the company flooded by the waters of the dam.

Laws of 1901, Chapter 669, authorizing two individuals to construct a dam across the Hudson River in Warren County with the right to forever maintain the dam and granting them any "interests of the state in lands under the waters of said river covered by the said dam, or which may be flooded by the erection thereof or under any works which they shall construct on or adjacent to said dam * * *."

The records of the Public Land Office show that it has been the continuous practice of the state both before and since the year 1894 to grant to corporations and individuals title to lands of the state under water in Forest Preserve Counties which are separated from wild Forest Lands and are outside of villages and cities. These grants have been made for the purpose of constructing docks, dykes and bridges. A list of such grants is appended to this Brief (See Appendix H).

In the report of the Forest Commission for 1904 there is a description of the forest preserve lands *outside* of the limits of the Adirondack Park which shows the location and acreage of the lands, and specifies whether they are forest, waste, denuded, wild, meadows, improved, or what is known as water surfaces, that is, lakes, ponds and reservoirs; but no mention is made of the land under the waters of the St. Lawrence River.

Chapter 802 of the Laws of 1896, established the St. Law-

rence reservation which consists of "all that part of the river St. Lawrence lying and being within the state of New York, with the islands therein," including, of course, the land under the water of the river. By Chapter 273 of the Laws of 1897 an appropriation is made "* * * for building wharves, piers and necessary buildings * * * and for otherwise maintaining and improving the lands of the state within such reservation." And Chapter 606 of the laws of 1898, page 1429, authorizes a further appropriation for "docks and improvements upon state lands in the state reservation on the St. Lawrence River." Similar appropriations have been made in later acts and those for the forest preserve have always been made separately from those of the improvement of St. Lawrence Park (See Chapter 419, p. 1043, Laws of 1900; Chapter 606, Laws of 1898; Chapter 729, p. 1837, Laws of 1904; Chapter 700, p. 1963, Laws of 1905; Chapter 578, p. 1294, Laws of 1907). The improvements authorized to be made in the St. Lawrence Reservation are obviously not even remotely connected with the preservation of the forest.

Finally, it is significant that, although in the acts establishing the Adirondack Park and the Deer Park in the Catskills, it was recited that they constituted a part of the forest preserve, the same statement is not made with reference to the St. Lawrence Reservation in the act by which it was created (See Section 1, Chapter 562, Laws of 1887; Section 120, Chapter 332, Laws of 1893; and Chapter 802 of the Laws of 1896).

All of the foregoing legislation constitutes a body of evidence as to the legislative intent which is most persuasive to show that it never was the purpose to include as a part of the forest preserve the lands under the waters of the St. Lawrence River. It amounts to a practical construction of the statutes and of the Constitution which must be held to be controlling as to their meaning.

In the case of *The City of New York vs. New York City Railway Company*, 193 N. Y., 543, the Court says at page 549:

> "* * * when the meaning of a statute is doubtful, a practical construction by those for whom the law was en-

acted, or by public officers whose duty it was to enforce it, acquiesced in by all for a long period of time, in the language of Mr. Justice NELSON, 'is entitled to great if not controlling influence.' (*Chicago v. Sheldon*, 9 Wall., 50, 54). In *People ex rel. Williams v. Dayton*, 55 N. Y., 367, the practical construction of a doubtful statute by the legislative and executive departments, continued for many years, was held to have 'controlling weight in its interpretation.' To the same effect is the case of *Power v. Village of Athens* (99 N. Y., 592). It is held to have great weight even in the construction of the Constitution itself (*People v. Home Insurance Co.*, 92 N. Y., 328, 337; *People ex rel. Einsfeld v. Murray*, 149 N. Y., 367, 376)."

Furthermore, it has frequently been held that the meaning of terms in a statute and the object sought to be accomplished by legislation may be determined by reference to reports furnished the legislative body (*People ex rel. Manhattan Railroad Co. vs. Barker*, 152 N. Y., 417; *Grimmer vs. Tenement House Department*, 134 App. Div., 896; *Tenement House Department vs. Moeschen*, 179 N. Y., 325-331; *People ex rel. Cohen vs. Butler*, 125 App. Div., 384-388). Accepted canons of construction do not permit the law to be interpreted solely by technical adherence to the strict letter of the law. The legislative intent in dealing with the subject of forest preservation cannot be misunderstood; and, as was said in *People ex rel. Jackson vs. Potter*, 47 N. Y., 375, at page 379: "The intent of the law maker is to be sought for. When it is discovered it is to prevail over the literal meaning of the words of any part of the law * * * and the same rules apply to the construction of the constitution as to that of a statute law." In *Riggs vs. Palmer*, 115 N. Y., 506, the Court elaborately considered the proper construction to be given statutes in which the letter of the law was opposed to the intent of the Legislature, and in construing Chapter 332 of the Laws of 1893, EARL, J., says (p. 509):

"It is a familiar canon of construction that a thing which is within the intention of the makers of a statute

is as much within the statute as if it were within the letter ; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation ; and Rutherforth, in his Institutes (p. 407), says : ' When we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more than his words express.' "

Furthermore, while there is no precise definition in any judicial decision in this State of the lands constituting the forest preserve, it is quite evident that the courts are of the opinion that the language of Article VII., Section 7, does not exclude the interpretation for which we contend. In *People vs. Fisher*, 190 N. Y., 468, the State by building reservoirs in certain rivers in Lewis county overflowed forest lands belonging to the defendant and under provisions of the Canal Law acquired the fee of such lands and also a strip above the line of the flowage. Defendant claiming ownership of this strip entered and cut off trees therefrom. The State sued for this trespass under Section 222 of Forest, Fish and Game Laws, Laws of 1900, Chapter 20, and the defendant claimed among other things that the trees cut were not within the Forest Preserve. It was held, however, that the strip was within the Forest Preserve.

In discussing this point the Court said, page 480, per CHASE, J. (after quoting Section 216 of the Laws of 1900, Chapter 24) :

"The language of the statute thus specifying the lands which are included within the forest preserve is clear and definite and does not in itself require construction. Its plain and positive language is made even more certain by the fact that some exceptions are stated therein. It is suggested that serious trouble and inconvenience may arise if lands owned by the state

within the boundaries of the forest preserve but not specially purchased and held as wild forest lands are treated as a part of the forest preserve. *The questions that may arise about lands owned by the state within the boundaries of the forest preserve, but which are now devoted or which it may be desirable to devote to purposes other than as wild forest lands, may be left for solution when they arise.*

"The lands upon which the trees were cut are wild forest lands owned by the state within the forest preserve, and although acquired pursuant to the statutes relating to the canals and works belonging to the state connected with the canals, *were acquired for purposes and objects directly connected with the forest preserve and the preservation and supply of water in the streams leading from the forest preserve.*

"*The lands in question are not only owned by the state, but their retention as wild forest lands is within the spirit as well as the letter of the statute creating and defining the preserve.*"

In *People vs. Long Island R. R. Co.*, 126 App. Div., 477, it was decided that the etymological meaning of the word "forest," as used in the law, was to be applied and it adopted the definition of a forest that it is "a tract of land covered with trees; a wood, usually one of considerable extent; a tract of woodland, with or without enclosed intervals of open and uncultivated ground."

All of these considerations seem amply to justify the opinion that the words "Forest Preserve" were not intended to include lands under the waters of the St. Lawrence River, for the reasons that they are neither wild nor forest lands, that they are not physically located in the vicinity of such lands, and that they are not, and cannot, be used for any purpose related to forest preservation, but that, on the contrary, they have been appropriated by the State to purposes which are inconsistent with their use in connection with the preservation of the forests.

FOURTEENTH POINT.

The act incorporating the Long Sault Development Company embraces only one subject and that is expressed in the title.

Article III., section 16, of the State Constitution provides:

> "No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."

In construing this section, the Court of Appeals has always emphasized the broad and extensive meaning of the word "subject," as used in this Article of the Constitution and as distinguished from the "objects," "purposes" and "details" of a bill. The provisions of a bill may be as numerous and diversified as the legislature wills, providing they all bear a reasonable relationship to the one general subject which is indicated in the title.

In sustaining a bill entitled "An act in relation to that part of the Great Western Turnpike Road, commonly known as Western Avenue," which, in addition to providing for the transfer of the turnpike to Park Commissioners, authorized an issue of bonds by the City to pay for grading and improvements, WESTBROOK, J., says in *Hurlburt vs. Banks*, 52 Howard Practice Reports, 196 (affirmed, 67 N. Y., 568) (at p. 202):

> "* * * the exact word used 'subject' must be borne in mind. * * * What the act proposes to do with the 'subject' need not be stated in its title, nor the machinery to be put in operation therein disclosed. It is enough if the 'subject' of legislation be stated. * * * The author of an essay or lecture in choosing and announcing his subject does not ordinarily declare in its title his proposed treatment thereof, but he simply states upon what he is to write or speak and he who would know more must read or hear what is written or spoken upon that topic. Precisely this the framers of the constitution had in mind."

The historical purpose of the section was to guard against deception, but not to convert the title of a bill into an index of its contents. This principal is laid down in *Sun Mutual Insurance Company vs. Mayor of N. Y.*, 8 N. Y., 241, where the court says at page 253 :

> " The purpose of the sixteenth section was that neither the members of the legislature nor the public should be misled by the title, not that the latter should embody all the distinct provisions of the bill in detail."

and in *Brewster vs. City of Syracuse*, 19 N. Y., 116 :

> " The degree of particularity with which the title of an act is to express its subject is not defined in the Constitution and rests in the discretion of the Legislature. * * * An abstract of the law is not required in the title."

The meaning of the section is further defined by O'BRIEN, J., in *Sweet vs. City of Syracuse*, 129 N. Y., 316, in the following language, page 331 :

> " It is necessary that the title be such as to fairly suggest or give a clue to the subject ; but when that is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment are proper to be incorporated in the act and are germane to the title."

The principle stated in this decision was applied in the frequently cited case of *People ex rel. City of Rochester vs. Briggs*, 50 N. Y., 553. The court there considered a bill entitled " An act to amend the several acts in relation to the City of Rochester " which contained 30 sections dealing with all departments of the government of the city, including taxes, public works, water supply, and to some extent street railroads. CHURCH, C. J., in sustaining the bill, says page 561 :

> " It seems to me very clear that a subject is expressed in this title, which is the government or charter

or corporation of the City of Rochester, and hence the bill may embrace all the details of the city government."

This principle has been applied in cases too numerous to be referred to in detail, in which the constitutionality has been sustained of bills which deal with matters the subjects of which are indicated only in the most general terms.

People ex rel. Brockport vs. Sutphin, 166 N. Y., 163.
Matter of P. P. & C. I. R. R. Co., 67 N. Y., 371.
Matter of Department of Public Works, 86 N. Y., 437.
Matter of Knaust, 101 N. Y., 188.
Astor vs. Arcade R. Co., 118 N. Y., 93.
Van Brunt vs. Town of Flatbush, 128 N. Y., 50.
Matter of Clinton Avenue, 57 App. Div., 166 affirmed 167 N. Y., 624.

The Act before us is entitled :

" *An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault Island, for the purpose of improving the navigation of the St. Lawrence River and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities.*"

The subject of the Act is, therefore, the creation of a corporation of the character indicated by the title. It is quite true that the title refers to some purposes which need not have been enumerated. But the constitutional provision does not purport to limit the number of matters which may be referred to in a title ; and the elaboration adopted in the title tends to prevent any misconception of the scope of the bill, and is, therefore, in conformity, and not in conflict, with the spirit of the constitutional provision. If the body of the bill does not embrace more than one subject, and if that subject is expressed in the title, the requirements of the section are satisfied. Thus in *Leffmann vs. Long Island Railroad Company*, 120 App. Div., 528, the bill in question was entitled, " An act authorizing the Common Council of the City of Brook-

lyn to widen and extend Atlantic Avenue and to widen Schuyler Street in the City of Brooklyn, and to ratify and confirm an agreement therein mentioned between the said City and the Long Island Railroad Company and the Brooklyn and Jamaica Railroad Company." It was argued that the title of the act applied to more than one subject, namely, the opening of highways and the ratification of a contract between the City and the Railroad Companies, but the Court held that a single subject was expressed, namely, the authorization of a public improvement. MILLER, J., page 532, says :

> " The purpose of the act was the improvement of Atlantic Avenue, and the fact that the title was more specific than is necessary does not show that the act embraced more than one subject within the meaning of the Constitution."

A bill was declared in part unconstitutional in the case of *Economic Power & Construction Co. vs. City of Buffalo*, 195 N. Y., 286, which was entitled merely " An act to incorporate the Economic Power & Construction Company." In the body of the bill the corporation was granted without compensation to the state, the right to use all of the streets, avenues and public places in every city, town and village of the state for any of the purposes of the corporation. It was very reasonably held that the title of a bill merely stating the name of a corporation would not fairly advise the public or the members of the legislature that such vast and immensely valuable franchises were being granted by the State. The court says by CHASE, J., page 298 :

> " The object of the constitutional requirement was to advise the public in general and the members of the legislature in particular by the title of the bill what interests are likely to be affected by its becoming a law. Therefore it is very apparent that the title of a bill may be so limited as to exclude provisions which unquestionably could fairly be enacted in a single statute with a more comprehensive title. The title must fairly express the general purpose of the bill."

In the light of the principles laid down in the foregoing decisions it becomes plain that the title of the bill creating the Long Sault Development Company deals in a comprehensive way with the organization of a corporation of a specific character and having specified purposes. All matters fairly connected with those purposes and which will or may facilitate the accomplishment of those purposes are properly included in the body of the bill, and need not be enumerated in the title. One of the purposes of the corporation is to construct a bridge. The right to charge toll is an incident to and in aid of this purpose, but is not a distinct subject of the bill. The same is true of the right to acquire title to real estate needed for corporate purposes. Thus in *Matter of New York and Long Island Bridge Company*, 148 N. Y., 540, the bill was entitled, "An act to incorporate the New York and Long Island Bridge Company; for the purpose of constructing and maintaining a bridge over the East River between the City of New York and Long Island." The corporation was given the power to acquire as much real estate as was necessary for the purpose of the company, to exercise the power of eminent domain and to charge tolls. It was held that these powers were details of a complete scheme which was adequately described in the title of the act and that the same was constitutional.

In *Parker vs. Elmira Railroad Co.*, 165 N. Y., 274, the title was "An act to authorize the Utica, Ithaca and Elmira Railroad Company to extend their road and to confirm their purchase of a portion of the roadbed of the Lake Ontario, Auburn and New York Railroad and for other purposes." The act among other things authorized the Elmira Railroad to charge a fare not exceeding four cents per mile, and it was held that the matter of regulating fares was germane to the subject of extending the road. O'BRIEN, J., page 278:

> "The extension of the road was the real subject expressed, and all the rest may be regarded as surplusage. The rate of fare which might be charged when the road was extended, as described in the act, was not foreign to the subject expressed in the title, and hence there was no violation of either the letter or the spirit of the constitution."

In *Freeman vs. Panama Railroad Company*, 7 Hun, 122 (General Term, 1st Department), the bill entitled " An Act to incorporate the Panama Railroad Company " authorizing the Company, in addition to constructing and maintaining a railroad, to purchase and navigate steam and sailing vessels in connection with the operation of the road. The court says, page 123 :

> " The subject of the act is the creation of a body corporate bearing the name of the Panama Railroad Company."

The creation of the corporation was held to be the subject of the legislative act and not the character of the business authorized. The objects of the corporations were distinguished from the subject of the bill. At page 123 the Court says :

> " So far as these objects are limited by the act to one body corporate, they constitute in mass the single subject which the act must contain and which the title may express in the form adopted in this case under the provisions of the Constitution above recited. To hold otherwise is to hold that the title of the act must contain all these details and set forth every power, duty and obligation of the body corporate. That was clearly not the intent with which the constitution was framed, and the omission of such details in the title of an act is not the mischief sought to be prevented."
>
> See, also, *New York Board of Fire Underwriters vs. Whipple*, 2 App. Div., 361.

The opinion of the Attorney-General dealing with this phase of the bill suggests as the principal objections to its constitutionality under Section 16 of Article III, that the title of the bill does not indicate that the right to take toll is given to the Company, or that the title to the bed of the St. Lawrence River is to be conveyed to the corporation, or that the charter is perpetual. We have shown by the authorities cited that matters of this kind relate to powers conferred in aid of the prin-

cipal subject described in the title of the bill, and need not themselves be enumerated therein. Under the act title is to be acquired by the company only to such portions of the bed of the river as are covered by the dams, sluices and other works of the corporation. The subject of the act, as indicated in the title, includes the construction of these works in aid of which the right to acquire such title is given. This right could not more appropriately be considered a distinct subject than the right of eminent domain or the right to acquire all property necessary for the purpose of the corporation, which rights were granted, as we have seen, to a bridge company *(New York & Long Island Bridge Co., supra)*. The act under consideration in the *Long Island Bridge* case granted to the Bridge Company the right to take tolls, and was sustained as constitutional by the Court of Appeals. The duration of the corporation is obviously not a distinct subject within the meaning of the constitution and requires no comment.

The case of *Coxe vs. The State*, 144 N. Y., 396, is relied on by the attorney general as decisive of the contention that the act incorporating the Long Sault Development Company embraces more than one subject. In that case the bill, which was entitled "An act to authorize the drainage of marsh lands" created a corporation with authority to exercise the right of eminent domain, to compel property owners benefitted by the operations of the corporation to pay assessments, and to acquire the title of the State to all lands under water within the limits of the counties of Queens, Richmond, Suffolk and Kings, except the City of Brooklyn. An examination of the title of the act, in connection with the body of the bill and the "extravagant magnitude of the grant" therein made, to use the language of the court, discloses the substantial distinction between that decision and the case now before the court. "The drainage of marsh land" would hardly suggest to any reasonable mind that a corporation was to be created to acquire title to substantially all of the lands of the state under water in four counties. The title is grossly deceptive and clearly a cloak for the real object of the bill, which was the acquiring of vast tracts of land from the state by a corporation not named in the title of the bill. That the decision of

the court rested on this ground, appears from the opinion of O'BRIEN, J., at page 409, where he says:

> "It is quite clear that no citizen or member of the legislature would expect to find such an extraordinary grant from the state of lands under water in the body of a bill with such a title, and that is the fair test of the question."

FIFTEENTH POINT.

The fact that the title of the State to the land under water is held by virtue of its sovereign right and in trust for the benefit of the public, does not preclude it from divesting itself of the title thereto for public purposes, such as the improvement of navigation by the building of a dam and the conservation of water-power created by such improvement.

Most of what has been said above in the Second Point is applicable to this Point. The contention of the Attorney General was based below chiefly upon the decisions in *Coxe vs. The State*, 144 New York, 396, and *Illinois Central Railroad Company vs. Illinois*, 146 U. S., 387. In attempting to apply the rule to the grant to the Long Sault Company, the Attorney-General fails to consider that the benefit to the public which will sustain a grant of public land to a private person or corporation is rarely immediate or direct. The primary benefit is usually enjoyed by the grantee who improves the land granted, and the advantage to the public follows later. If the rule is to be regarded as being as narrow as the Attorney-General seems to contend that it is, there are hundreds of grants by the State of New York for dams, docks and railroads which would have to be set aside as unconstitutional.

In *Coxe vs. The State, supra*, under the guise of an act to authorize the drainage of marsh lands, there was

authorized a conveyance to a private corporation of all of the land which the corporation chose to designate under the waters of the ocean or of Long Island Sound within the limits of the counties of Kings, Queens, Richmond and Suffolk, excepting such land as was within the limits of the city of Brooklyn. This covered lands extending over a water-front line of probably several hundred miles. There was no definite public purpose subserved by the proposed grant which could be clearly inferred from the provisions of the act. The court characterized the grant as being of "extravagant magnitude" and said that there was nothing in the act "to indicate that the grant was for any public purpose and none has been suggested," and that if the grant were sustained it would establish the principle that the State could "convey to a private corporation for private purposes the land under all the tidewaters within the jurisdiction of the state." What was said by the court must be considered in the light of these extraordinary facts, and when so considered it will be found to have no application to the case at bar.

In the *Illinois Central Railroad* case, the effect of the grant was to vest in a private corporation the power "to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally." The case presented was said to be one where it was attempted to sustain an "abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake" (page 452). The area of the land attempted to be conveyed embraced more than a thousand acres. Under these circumstances it is not strange that the Court concluded that "it would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself."

The distinction between those cases where the State can and those where it cannot convey the title to public lands is clearly drawn in the decisions in the *Coxe* and *Illinois Central Railroad* cases. They show that the public advantage which will justify a grant by the State, is by no means an advantage which directly and immediately flows from the making of the grant, but that the benefit to the public in all such grants is

more or less indirect and is almost always accompanied by a private advantage to the grantee. These and other decisions show that the discretion must rest largely with the legislature to determine whether or not the grant to a private individual or corporation will result in such benefit to the public at large as to justify the State in parting with its title. It has only been in very extreme circumstances like those existing in the *Coxe* and *Illinois Central Railroad* cases, where the Court has been unable to perceive from any reasonable interpretation of the facts that the public at large would be benefited *at all*, that grants by the State have been declared to be *ultra vires*. It is not necessary to go deeply into the learning upon the subject or to examine the historical difference which has been incorporated in our law between the *jus privatum* and the *jus publicum*, for the rule applying to the subject has been frequently stated in its application to modern conditions, by the Courts of this country, and there has not been, and there cannot be in the case at bar, much difficulty in its application.

In the *Coxe* case it is said that the title of the State cannot be alienated "except for some public purpose and some reasonable use which can fairly be said to be for the public benefit" (page 406). "* * * For every purpose which may be useful, convenient, or necessary to the public, the State has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee or to promote commerce according to their terms." Such grants are made "to corporations and private persons engaged in commerce or navigation for their necessary or reasonable use."

In *People vs. New York and Staten Island Ferry Company*, 68 N. Y., 71, the Court sustained a grant of certain lands under water adjoining Staten Island to the owner of the upland, but restrained a successor in the title from erecting certain structures upon it because they interfered with the public right in the waters of the bay. The grant was made by the Commissioners of the Land Office under an act authorizing them to grant to proprietors of adjacent lands, so much of the land under water "as they shall deem necessary to promote the commerce of the state." The Court said (p. 78):

> "The grant was made in the interest of commerce, as the statute authorizing it clearly shows, and was

accepted by Gore in this view. How the interests of commerce would be promoted by grants of lands under water, to the owners of the adjacent land, does not appear from anything contained in the statutes under which they are made. But it is not difficult to find reasons to justify such grants as being made in the interests of commerce and navigation."

See also *Langdon vs. The Mayor*, cited above in the Second Point, Subdivision B.

See, also, *Saunders vs. New York Central Railroad Company*, 144 New York, 75; *3 Kent's Commentaries, Ninth Edition*, page 546; *Hoboken vs. Pennsylvania Railroad Company*, 124 U. S., 656; and *Stevens vs. Paterson, etc., R. Co.*, 34 N. J. L., 532; *Rogers vs. Jones*, 1 Wendell, 237; *Kerr vs. West Shore Railroad Company*, 127 N. Y., 269; *Rumsey vs. N. Y. and New England Railroad Company*, 130 N. Y., 88; *Trustees of Brookhaven vs. Strong*, 60 N. Y., 56.

These cases sufficiently illustrate the principle which is to be applied in the present case, and it is only further necessary to mention a few instances where grants have been held to be for public interest. In the *Illinois Central* case it is stated that such grants have been sustained where wharves, piers, docks and other structures are to be erected in connection with the promotion of commerce. The grants to railroad companies for the construction of railroads, stations, and freight yards are familiar illustrations of what are deemed to be grants in the public interest; and the grant by the State of land under water to an upland owner is a common exercise of the power to convey public lands.

Numerous cases already referred to in this Brief, illustrate how the rule is interpreted in actual practice. It especially appears in the many grants of land under water, made in connection with the erection of dams, that the direct and immediate benefit conferred results to the grantee and that the benefit to the public at large is of a most general character—that which results from the encouragement of commerce by permitting individuals to engage in a business profitable primarily to themselves.

It has already been sufficiently shown that the Long Sault project had as a chief purpose the improvement of the naviga-

tion of the St. Lawrence River. But even if the object were to be regarded as a project for the development of water-power by the erection of a dam, that too appears always to have been considered a purpose for which grants of public land could be made. The conservation and sale of water-power improve commerce. While it is true that only a limited locality is affected, and that the effect upon commerce is more or less indirect, the same may be said with even more force in the case of a grant of land to an upland owner for the purpose of building a dock, where the benefit to commerce generally is somewhat remote and the principal advantage is to the upland owner. It will be seen by an inspection of the lists of grants of public lands and rights referred to in the Appendices to this brief, that unless such a grant as is made to the Long Sault Company is held to be within the power of the State, hundreds of grants made during the last one hundred years must be held to have been beyond the power of the State ; and the Court should hesitate long before making a ruling which would disturb the many titles which are derived under such grants, and which have been for many years enjoyed by the grantees and their successors in the title.

SIXTEENTH POINT.

The constitutionalty of the act of 1907 must be sustained unless it appears beyond reasonable doubt that the act conflicts with the fundamental law and that in no reasonable way can the provisions of the act be reconciled with the constitution.

In sustaining the constitutionality of the Rapid Transit Act of 1875, in *Matter of Gilbert Elevated Ry. Co.*, 70 N. Y., 361, CHURCH, C. J., says, at page 367 :

> " Every presumption is in favor of the constitutionality of acts of the Legislature. An adverse doubtful construction is not sufficient to condemn an act. It is

only in cases of a clear and substantial departure from the provisions of the fundamental law that courts will declare acts of the Legislature invalid (55 N. Y., 54 ; 50 *id.*, 553 ; 14 Mass., 340 ; 17 N. Y., 235 ; 23 Wend., 166).

" There is a distinction in this respect between the State and Federal Constitution. The former grants to the Senate and Assembly, all legislative power not prohibited by the latter, or excepted by the instrument itself ; the latter grants to Congress specific powers only. Hence the exercise of a legislative power by the State Legislature will be presumed constitutional under the general grant of power, and will be sustained unless brought clearly within some of the exceptions, while a similar exercise of power by Congress can only be justified by an affirmative grant embracing the power exercised.

See, also, *People ex rel. Henderson vs. Supervisors*, 147 N. Y., 1, at p. 15.

The following authorities are referred to as examples of the application of this well-known principle :

People ex rel. City of Rochester vs. Briggs, 50 N. Y., 553.
Weismer vs. Village of Douglas, 64 N. Y., 91.
People ex rel. Murphy vs. Kelley, 76 N. Y., 475, 489.
People ex rel. Sinkler vs. Terry, 108 N. Y., 1.
Bohmer vs. Haffen, 161 N. Y., 390.
People ex rel. Simpson vs. Wells, 181 N. Y., 252.

SEVENTEENTH POINT.

Mandamus was the proper remedy for the relief prayed for in the petition.

Since the Court of Appeals did not pass adversely upon and the Appellate Division expressly approved of, the propriety of a writ of mandamus as a proper method for protecting the rights of the plaintiff in error asserted in the petition

perhaps this question is removed from the consideration of the Court. The reasons, however, which would have made the writ proper, if the Court had taken our view of the rights of the plaintiff in error, are pertinent to show the character and extent of the impairment of those rights by the conduct of the State authorites and how irreparable will be the injury suffered by it if this Court does not intervene.

The Long Sault Company is required by Section 4 of the Laws of 1907 to " pay into the Treasury of the State " (R., p. 24) certain sums of money annually. The " amounts for each year shall be payable on or before the first day of February in the following year " (R., p. 25) ; and the amount payable on or before February 1, 1913, for the year ending December 31, 1912, was $25,000 (R., p. 13). This amount was tendered by the corporation to the State Treasurer on January 21st and again on January 27th (R., pp. 13, 14). Section 3 of the State Finance Law provides that " The Treasurer shall receive all moneys paid into the treasury of the State." It is conceded that the corporation made a proper legal tender of the amount due, and that the State Treasurer refused to receive the payment (R., p. 36). In this proceeding the corporation is, therefore, seeking to compel the State Treasurer, as a public officer, to perform a duty imposed upon him by statute. The duty of the Treasurer was a ministerial one, and the writ of mandamus is an appropriate means of compelling a public officer to perform such a duty. The accepted rule of law in the State of New York on this subject is stated by VANN, J., in *People ex rel. Harris vs. Commissioners*, 149 N. Y., 26, at page 31 :

> " When the law requires a public officer to do a specified act in a specified way upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus if there is no other remedy."

To the same effect are the decisions in *People ex rel. Stephens vs. Halsey*, 37 N. Y., 344, and *People ex rel. Wooster vs. Maher*, 141 N. Y., 330.

In *People ex rel. Cornell University vs. Davenport*, 117 N. Y., 549,the State Comptroller was compelled by writ of mandamus to issue his warrant for certain funds payable by the state to Cornell University. Application for the writ was made by the University as a party interested in the performance of the duty imposed upon the State Comptroller. In the present application the Long Sault Development Company is a party interested, and vitally interested in the payment of the amount due under the charter to the State. By Section 4 of the act of 1907 it is provided (R., p. 26) that

> " In case the said corporation shall fail to pay any amount due hereunder within sixty days after the same is payable as herein provided, in addition to any other remedies which may exist by law, the rights and privileges hereby granted may be forfeited."

It was suggested below by the Attorney-General that the corporation by making a legal tender of the amount due to the state had protected itself from the consequences of a default and that, therefore, it suffered no injury. This argument seems to address itself to a possible action or proceeding in the future on the part of the State to forfeit the rights and privileges granted by the Act because of the failure of the corporation to pay into the treasury of the State the amount which it has recently tendered. But whether or not the State would be estopped by the wrongful act of the Treasurer, to demand payment of the sum refused by the Treasurer, or to forfeit the charter rights for non-payment, does not seem of controlling importance. The duty to receive the money was imposed upon the State Treasurer by statute, and if his refusal to perform his duty causes actual damage to the corporation for which there is no other remedy, it follows that the writ should be granted; and if as a practical matter the corporation is damaged by its inability to pay this money into the treasury of the State, a public officer, concededly in default, should not be permitted to take advantage of finely spun theories or technicalities as an excuse for a refusal to perform his lawful duties.

The present case is on all fours with the application of an

owner of real estate to compel the proper public officer to accept taxes due on his property. The fundamental reasons for granting relief in cases of that kind are that a public officer has refused to perform a duty imposed upon him by statute and that his refusal to act has caused damage to the person applying for the writ.

In *People ex rel. Cooper vs. Registrar of Arrears*, 114 N. Y., 19, the relator had applied for all bills upon certain property owned by him in the City of Brooklyn, and had paid the bills received in response to his request. The Registrar had not included in the bills the full amount due and the property was subsequently sold to pay the amount omitted. The relator thereupon tendered to the Registrar sufficient money to pay the part of the taxes which had been omitted from the bills and the Registrar refused to receive the payment. The court granted a peremptory writ of mandamus compelling the Registrar to receive the amount tendered in order to remove the cloud upon the title.

In numerous instances public officers have been compelled by a writ of mandamus to accept payments tendered in payment of taxes which the court found to be properly payable.

People ex rel. Townshend vs. Cady, 50 Superior Ct., 399, affirmed 99 N. Y., 620.

Matter of Application of Clementi vs. Jackson, 92 N. Y., 591.

People ex rel. National Park Bank vs. Metz, 141 App. Div., 600.

The Appellate Division held expressly that unless the act of 1907 was unconstitutional the case was a proper one for a writ of mandamus to compel the State Treasurer to accept the money tendered to him (R., p. 41).

The damage suffered by the corporation because of the refusal of the State Treasurer to receive the amounts due under its charter is set forth in the petition at pages 20 and 21; and as the reason stated by the Treasurer for refusing to receive the payment, namely, the alleged unconstitutionality of the act under which it was tendered, strikes at the life of the corporation, it cannot be doubted that this action on the part of a public official injuriously affects the credit of the corporation, and the market value of its property and franchises.

The corporation is expressly authorized " to sell or convey all or any portion of its property and assets, and the franchises and rights appurtenant thereto " (R., p. 26). After the lapse of sixty days from the time when the corporation has failed to make payment of the amount due for the year 1912, the rights and privileges granted by the charter " may be forfeited " (R., p. 26). Can it be said that the corporation could convey to a purchaser a marketable title to its property and franchises while the amount due to the State remains unpaid ? The purchaser would at best be buying into a law suit.

No benefit can be derived by the corporation from the grant from the State of New York until the consent of Congress is obtained, and in the event of such consent being withheld the expenditures, amounting to $750,000, already made by the corporation, will in large part be lost. *The corporation could not possibly obtain favorable legislation from Congress so long as a public officer of this state refuses, on the ground that the Act of Incorporation is void, to receive payments due to the State under the terms of the charter ; or so long as the corporation has failed, for whatever reason, in the performance of an act, which under the terms of the act of incorporation, subjects all of its rights and privileges to forfeiture.* For, the corporation, before applying to Congress for approval of an extensive system of works authorized by the State of New York, would inevitably be expected to present evidence of an unclouded title to its State franchise.

The carrying out of the works contemplated by the corporation being dependent upon the consent of Federal authorities which has not yet been obtained, it is impossible to determine at this time the value of the assets and rights of the corporation, or the amount of damage which has been sustained through the act of the State Treasurer. A continuing damage will undoubtedly be sustained, however, so long as it remains impossible to make the payment to the State, and no remedy has been suggested by the Attorney-General, and we know of none, by which the corporation can obtain relief in the premises except by writ of mandamus. Furthermore, if it were conceded that the act of 1907 was constitutional, and that the refusal of the State Treasurer to receive the moneys tendered by the corporation was unlawful, that

officer could not justify a continuation of his wrongful conduct and his persistent disregard of his statutory duty, on the ground that the damage to the petitioner was difficult to demonstrate or impossible to measure.

EIGHTEENTH POINT.

The final judgment of the Supreme Court rendered on the amended remittitur of the Court of Appeals should be reversed, and there being no further question under the State law to be considered below, the Supreme Court should be directed to issue a peremptory writ of mandamus as prayed for in the petition herein.

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